THE MADRAS LAW JOURNAL

(JOURNAL)

I] JANUARY [1969

A CRITICAL NOTE ON THE DECISION OF THE MADRAS HIGH COURT IN *M. O. MUTHUKRISHNAN* v *COMMISSIONER, H. R. AND C. E., MADRAS.**

By

P. N. CHANDRASEKHAR, M A., B L , *Advocate, Thanjavur.*

The decision rendered in the above case is to the effect that when a Deputy Commissioner, H. R and C. E. passes an order under section 101 of the Act (Madras H R. and C. E Act XXII of 1959), 'granting certificate' the Commissioner has got jurisdiction under section 21 of that Act, in exercise of his powers of revision to cancel the order. It is submitted that this same conclusion (which is of course the correct one) could have been arrived at by a simple reference to the relevant sections and provisions of the Act itself, whereas the Judgment has failed to notice them, and has based its decision on a laboured interpretation of section 101 and by reference to extraneous decision which have led the learned Judge to make wide observations.

The term '*Court* ' has a special definition in the Act. It is defined in section 6 (7) of the Act as the Madras City Civil Court in relation to a Math or temple situated in a Presidency, Town, and in relation to a Math or temple situated elsewhere '*Court*' means the Subordinate Judge's Court having jurisidction over the area, and if there is no Subordinate Judge's Court, then the District Court Wherever the word '*Court*' occurs in the Act, it should be understood with reference to this definition only.

The various authorities under the Act,namely, the Government,the Commissioner, the Deputy Commissioner, the Assistant Commissioner, the Area Committee (functioning till recently) and the trustee, are competent to pass orders in discharge of duties assigned to them under the Act In respect of some orders, the Act makes provisions for "*Application to the Court or filing suit in the Court,*" by the party aggrieved by such order, to set aside or cancel such order. For example section 90 (4) of the Act provides for application to the '*Court*' by a trustee to set aside orders of surcharge passed against him by the Commissioner, Deputy Commissioner or Assistant Commissioner, and section 47 (4) provides for application to the '*Court*' by a hereditary trustee against the order of the Commissioner appointing a non-hereditary trustee under section 47 (2) . Section 53 (6) of the Act provides for a suit in the '*Court*' by a hereditary trustee against orders of the Government or the Commissioner suspending, dismissing or removing him Section 70 of the Act provides

* (1968) 1 M L.J. 376 . 81 M L.W. 954.

for filing a suit in the '*Court*' against orders of the Commissioner passed under section 69 of the Act. There are other similar examples. The Act prescribes special Court-fees and specified periods of limitation for such applications or suits in the '*Court*.'

A reading of section 21 of the Act clearly shows that if a person is aggrieved by an order of the Deputy Commissioner, or Assistant Commissioner or Trustee, and if in respect of that order, no suits or appeal to '*Court*' is provided in the Act, the Commissioner is competent to exercise his powers of revision over such order and annul or modify that order.

A reading of section 101 of the Act shows that when a Deputy Commissioner grants a certificate to the applicant trustee in respect of properties as belonging to an institution, *there is no provision in that section for an aggrieved party to make an application to a 'Court' or to file suit in a 'Court' to cancel the order.* In contradistinction to the several sections referred to above namely section 21, section 47 (4), section 53 (6), section 70 and section 90 (4) and similar other sections, the word '*Court*' is *designedly* absent in the third proviso in section 101 (1) of the Act, and the terminology is 'institution of a suit by a person aggrieved. *A fortiori* there is no period of limitation or Court-fee fixed in the section or schedule as for the other sections referred to above. Therefore when the said third proviso states that 'nothing contained in section 101 (1) shall bar the institution of a suit by any person aggrieved by an order granting the certificate for establishing his title to the property', the suit contemplated and provided for is a civil suit under section 9 of the Civil Procedure Code in a Court whose jurisdiction has to be ascertained from the Civil Procedure Code and for a Court-fee provided in the Court Fees Act (XIV of 1955) and for appropriate consequential reliefs. Therefore it follows that there is no bar for the Commissioner exercising his powers of revision over an order passed by the Deputy Commissioner under section 101 (1) of the Act granting a certificate in respect of the properties belonging to the Institution, and for his cancelling the certificate.

No doubt the learned Judge has come to the same decision but the grounds stated involve a complicated different line of reasoning which it is respectfully submitted was not necessary. In thus rendering the Judgment the learned Judge has sometimes used language which it is submitted may be put to distored interpretations. In one place the learned Judge says: "The scope of the suit under the third proviso to the section is not *designed* (italics mine) for the purpose of cancelling or modifying the certificate of the Commissioner . the grant of the certificate will leave *intact* the title of the person to the property . .. " "Such title can be decided in an independent suit." In another place the learned Judge says: "But in section 101 the scope of the suit is *not directed* (italics mine) either to the certificate .. or order directing delivery......but relates to the title of the aggrieved party which is preserved intact.

It is seen from section 101 (1) that the Deputy Commissioner holds an enquiry among other things *to the title* of the religious institution to the property. He gives a finding that the property *belongs* to the institution and the 'Certificate' also states that the property *belongs* to the Institution. It is this finding that empowers the Magistrate to order delivery. For the purpose of the proceedings under section 101, the certificate is conclusive evidence of such *ownership* The cause of action for the suit to be filed by the aggrieved party is therefore the grant of the certificate recognising

a right hostile to his title and the threatened delivery or actual delivery. In the former contingency he has to pray for injunction and in the latter for possession also as consequential reliefs Therefore the proceedings under section 101 involving the grant of certificate and order of delivery and the suit for declaration of title cannot stand independently in water-tight separate compartments When examining the plaintiff's claim to the title, the Court incidentally examines also the grounds on which the Deputy Commissioner has based his decision that the property belongs to the temple. If the plaintiff succeeds in his title suit, the decision of the Deputy Commissioner and the order of the Magistrate stand nullified To this extent the suit is in effect though not in form to annul the certificate and order for delivery which otherwise will continue to hold good for the proceedings under section 101 of the Act.

LAW'S DELAY.

By

T. S. SUBRAMANIAN, *Advocate.*

Speeches are made often commending measures to mitigate law's delays. But in actual practice what happens is the other way about. Take for instance, the time taken for furnishing copies of judgment in cases in which appeals have to be preferred in civil cases. Normally, nowadays it takes 6 to 8 months for a printed copy of judgment to be supplied to parties and it is incumbent that printed judgment should be produced for preferring the appeals. If however an emergent order such as a stay has to be obtained you can for the nonce produce a typed copy, though the printed one cannot be dispensed with. What a waste of time is entailed in the mere getting of the copies! Justice delayed is justice denied and it is a wonder why those that are responsible to see that copies are supplied could not get them ready in a short time, say such as a month at the most.

There is no good merely making flamboyant talks without actually advancing one step in the matter of speedy disposal of litigation.

FREEDOM OF CONTRACT.*

By

V G. RAMACHANDRAN [1]

There is no absolute independence just as there is no absolute freedom of contract. Both are conditioned by certain requirements to balance the interests of State v. State, Individual v Society, Individual v Individual, etc. In abstract theory, it is lovable to have complete freedom of contract. But as will be seen in the discussion below such absolute freedom appears difficult for one reason or another. In England, from whom the modern Law of Contract has flown to India, the concept of freedom of contract was restrained in Equity Legislation as also under the common law

No doubt the Courts of Equity even during the seventeenth and eighteenth centuries were inclined to assist in the enforcement of contracts. But it declined to exercise it in cases where the Petitioner was guilty of dishonesty and sharp practice. Where A contracted to purchase the estate of B pretending that it was for a friend of B and therefore got it cheaper, when in fact he had bought it for another, the Court refused to help A.[2] In **Webster** v. **Cecil**[3] plaintiff sued for specific performance of a contract to sell a certain property for £1,250. The defendant's plea was that he had refused to sell it to the plaintiff even for £2,000 but in his letter he had by mistake offered it for £1,250. The plaintiff knowing the error accepted the written offer The Court refused to help the plaintiff and said that it could not compel a party to sell property for less than its real value. In Equity, the plaintiff can ask no relief though he may try his luck at Common Law Courts of Equity were so jealous in protecting a party from injustice that they did not look with favour the provision in section 4 of the Statute of Frauds whereby a contract not in writing could be enforced. In **Half Penny** v **Bollot**[4], the Court stated "that they cannot allow the statute to be made a cloak for fraud, and that it would be something like fraud if the promise is true on oral evidence and yet the promisor would take shelter under the statute.

A. LEGISLATIVE ENCROACHMENTS.

The sanctity of contracts had thus a set back and an encroachment by the provision in the Statute of Frauds But the reason for the Sstatute was to prevent frauds in innocent persons by manipulated oral evidence There were other legislative encroachments on the freedom of contract Thus the Sunday Observance Act, 1677 made all contracts entered into on Sundays void due to religious reasons prompted by puritan influences in the early days on legislation Wagering Contracts provided was another field for what may be called moral legislation to put down gambling. For Wagering Contracts were not illegal or unenforceable at Common Law The Gaming

* The extent to which the orthodox principle of a contract being born of the free consent of both the parties thereto has been undermined is to be seen in the power of the Industrial Tribunal by its award to *make* a new contract containing new rights and obligations and *impose* it on the parties who are bound by it *See* (1950) Lab L J (S C) 921, 948-9—Ed.

1. Author of ' Law of Parliamentary Privileges ', Fundamental Rights and Constitutional Remedies, The Law of Contempt of Court, Administrative Law, etc.
2. *Phillips* v *Duke of Bucks*, (1682) 1 Vern. 227.
3. (1861) 30 Beav. 62.
4. (1699) 2 Vern. 373.

Act, 1840, declared all contracts or agreements by way of gaming or wagering null and void, except where it was a contribution towards a lawful prize. The contracts were yet not illegal in the strict sense.

The Gaming Act, 1892 made void any promise to pay any person money paid by that person under the Gaming Act, 1845 or any agreement to pay a sum of money by way of fee or reward in respect of any services relating to such contract. In the matter of Infant's Contracts the Infants Relief Act, 1874, declared three classes of infant's contracts absolutely void, e.g.: Contracts to repay money loans, contracts for goods supplied or to be supplied (other than necessaries) and all accounts stated.

The Truck Act, 1831, was another instance of an inroad into Contract Law. It made it an offence for an employer to contract that wages payable to his servant should be paid otherwise than in current coin of the realm and declared such contracts as illegal. This saved the employee from exploitation by the employer in compelling the former to take vouchers for purchase of commodities in the employer's shop at his price.

The Money-Lenders Act, 1900, and 1927 were further statutory inroads in private Contracts with the object of saving the debtor from usury and malpractices indulged in by the lender. The Hire Purchase Acts of 1938 and 1954 were further instances intended for the protection of the hire purchasers in the lower income groups. Labour Legislation intended to protect the employees from onerous contracts forced on them by the employer. The Trade Unions Act, 1871 provided that the purposes of a Trade Union should not by reason only that they were in restraint of trade be treated as unlawful either (a) so as to make members of the association criminally liable for conspiracy, or (b) so as to render void or voidable any agreement entered into by them. For political and industrial reasons certain trade union contracts have been made statutorily unenforceable by Courts.

B. AT COMMON LAW.

The curtailment of the freedom of Contract by the Common Law Courts through the theory of implied terms and the doctrine of frustration of contract, is well known. Contracts opposed to law or morality or if in restraint of trade and other restrictive practices by statutory sanction were fetters on the freedom of Contract Yet again Courts had to respect executive arrangements and no agreement can bargain away the fundamental discretionary powers of the State

(a) Doctrine of implied terms.—It is true, as Sir Frederick Pollock, had observed[5], that Courts "were averse to going beyond the strict letter of instruments and would only in extreme cases imply terms that were not expressed or at least imported by some generally understood custom." Often businessmen enter into contracts and respect the usages and conventions in vogue in the business though the written Contract may not have those reduced to writing. Bowen, L.J.[6] was of the view that in business transactions "what the law desires to effect by the implication as must have been intended at all events by both parties who are businessmen, not to impose on one side all the perils of the transactions, or to emancipate one side from all the chances of failure, but to make such party promise in law as such at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances" These opinions crystallised slowly and were codified

5 Pollock on 'Contracts' 13th Edn, p 297.

6. In The Marooch (1889) 14 P.D. 64-68. See also *Sethia Ltd.* v. *Partabmul Rameshwar*, (1951) 2 All E.R. 352n.

in the Sale of Goods Act, 1898. The statutory provisions only gave effect to the intention or will of the parties, in the background of trade usage, or past professional dealings. Difficulties arose when such background was not available. Then the Court was driven to find out what provisions the parties would have made as reasonable persons "if they had contemplated facts which had proved to be beyond their provision".[7]

The Bills of Exchange Act, 1882, The Sale of Goods Act, 1898, Merchant Shipping Act, 1894, Marine Insurance Act, 1906, Landlord and Tenant Act, 1927, Housing Act, 1936, Hire Purchase Act, 1938, are all statutory provisions containing what may be called "Statutory Implied Terms".

The theory of implied terms gradually developed and Judges like Denning, L.J.[8] would "no longer credit a party with the foresight of a Prophet or his lawyer with the draftsmanship of a Chalmers" and so would prevent injustice by reading into the contract the necessary implied terms The tendency was to make wider use of the theory of implied terms for adjusting the rights and obligations of parties. In **Hivae Ltd.** v. **Park Royal Scientific Instruments Ltd.**[9], employees of the plaintiff Company worked in their spare time for the rival concern producing the same appliances Injunction against them was granted on the ground "that there should be implied into the contract of employment, a term that the servant undertakes to serve his master with good faith and fidelity."

Implied terms were often read into a Contract in many cases.[10] A word of caution was however sounded by Mackinnon, L J.[11] to this effect:

"I recognise that the right or duty of a Court to find the existence of an implied term or implied terms in a written contract is a matter to be exercised with care, and a Court is too often invited to do so on vague and uncertain grounds".

A too wide application of the 'implied terms' theory would in the words of Denning, L.J.[12], "have seriously damaged the sanctity of contracts."

(b) When performance is impossible and frustrated—The Common Law postulated that a person is bound by the terms of his contract, physical or legal impossibility of performance being no answer[12-a] But Courts found the implied terms theory handy to grant the needed relief if there is frustration of contract, due to an intervening event or change of circumstances so fundamental as to strike at the root of the agreement [13] Lord Loreburn[14] explained that Courts discharged a contract in certain events as it was able to 'infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was the foundation upon which the parties contracted."

The doctrine of frustration was ably put by Lord Russel of Killowen in Re **Badische Co.**[15], that "it rests on an implication arising from the presumed

7. *See* "The Sanctity of Contract", Sir David Hughes Parry, p 42

8 *British Movietonews* v *London and District Cinemas Ltd*, L R (1951) 1 K.B 190, 202 (1950) 2 All E R 390

9. L R (1946) Ch 169

10 *Martin Baker Aircraft Co, Ltd* v *Canadian Flight Equipment Ltd*, L R (1955) 2 Q B 556, *Ramford Ice and Cold Storage Co, Ltd* v *Lister*, L R (1957) A C 555.

11 *Shirlaw* v *Southern Foundries Ltd*, L R. (1939) 2 K B 206, 227

12 See L R. (1956) 1 K B 302 at 308

12-a See *Paradine* v *Jane*, (1647) Aleyn 96

13. *Taylor* v *Caldwell*, (1863) 3 B & S 826.

14. *Tamplin S S Co, Ltd* v *Anglo Mexican Petroleum Products Co., Ltd*, L R (1916) 2 A.C 397, 404

15. L R (1921) 2 Ch 331, 379.

common intention of parties If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express, term of the contract."

The doctrine of frustration on the implied term theory would however appear unjustified if the parties to the contract had adverted to the possible happening of the frustrating event but nevertheless decided to do nothing about it and made the contract in absolute terms [15-a] The doctrine may not also be invoked when the parties had provided in general terms what was to happen on the occurring of the frustrating event In such a case a term could not be implied if it would conflict or be inconsistent with the parties' express provision Yet, in **Bank Line Ltd.** v **Capel**[16], the House of Lords decided otherwise. So the position in law now is that the contract is deemed frustrated on the occurrence of the frustrating event irrespective of the volition or the intention of the parties or their knowledge as to that particular event [17] As Streatfield, J stated[17] "their own belief and their own intention is evidence and evidence only, upon which the Court can form its own view whether the changed circumstances were so fundamental as to strike at the root of the contract and not to have been contemplated by the parties "

Thus the Court by a legal fiction can assume the jurisdiction to modify or dissolve contractual obligations with a view to dispense justice, having due regard to the changes in circumstances beyond the control of parties. The change of circumstances and the reasonable attitude in the role of the Court in that regard, practically makes the 'implied term' theory unnecessary for discharging a contract that is frustrated Lord Wright[18] put it pithily "that the Court or jury as a Judge of fact decides the question in accordance with what seems just and reasonable in its eyes The Judge finds himself the criterion of what is reasonable The Court is in this sense making a contract for the parties though it is almost blasphemy to say so "

(c) When Contract is opposed to Law or Morality.—The Common Law Courts gradually followed the footsteps of the Courts of Chancery and the Legislature in some needed encroachment on the sanctity of contracts on the ground of illegality or immorality It appeared paradoxical that the Courts who looked into the morality of upholding contractual obligations, were disposed to destroy them on the ground of public policy. Lord Mansfield's pronouncement in **Holman** v **Johnson**[19] is oft quoted in this connection —

"The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant It is not for his sake, however that the objection is allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The Principle of Public Policy is this, **ex dolo malo now orituer actio.** No Court will lend its aid to a man who founds the cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the

15-a See *Maritime National Fish Ltd* v *Ocean Trawlers Ltd*, L R (1935) A C 594-99.

16 L R (1919) A C 435

17 Per Streatfield, J, in *Morgan* v *Manser*, L.R (1948) 1 K B 184 at 191.

18. Legal Essays and Addresses, p. 250

19. (1775) 1 Coup 341.

cause of action appears to arise **ex turpi causa**, or the transgression of a positive Law of this country there the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant are to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, **potior est conditio defendentis.**"

It appears distinctly distasteful that a man who has promised should be allowed to wriggle out of that promise on the plea of illegality or immorality Thus a person who had work done for him by a building contractor, could refuse to pay on the plea that the contractor had no licence and so the transaction was vitiated [20] Further the immorality or illegality of contractual obligations appears to fall more heavily against the plaintiff leaving the defendant to reap the dividends All this could be justified only on the ground of public policy The State and hence its Courts are bound to refuse its aid where agreements involve crimes, immorality and illegality If the State does not do this who else can? Justice Cordozo put this pithly "If the moral and physical fibre of its manhood and womanhood is not a State concern, the question is what is?"[21] One could, however, agree with Lord Atkin[22] in his statement that "the doctrine should only be involved in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few Judicial minds "

Suicide is a crime and so if the policy holder shoots himself before the policy matured, the executors could not recover the insured amount since as Lord Wright put it[23] "the Court must, we think, apply the general principle that it will not allow a criminal or his representative to reap by the judgment of the Court, the fruits of his crime "

(d) Restraints of Trade-Barter Contract.—Courts in England even as early as in 1596 considered restraints in trade harmful to the development of commerce as such restraints in business contracts have a tendency to create monopolies [24] In Lord Macnaghten's words[25] "The Public have an interest in every person's carrying on his trade freely, so has the individual All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void " Unless the restraint clause is beneficial to the Promisee and not inimical to the State's interest, Courts will strike down contracts with restraint clauses The Restrictive Trade Practices Act, 1956, has in the provision in section 21 a dictum that all registrable restrictive agreements within the Act are presumed to be contrary to the public interest unless they are justifiable under the Act. The whole thing rests on the ground of public policy What is public policy is difficult of precise definition Lord Truro would say[1] that it was a "principle of judicial legislation or interpretation founded on the current needs of the community " Lord Wright would put it differently[2] as "considerations of public interest which require the Courts to depart from their primary function of enforcing contracts

---

20 Per Lord Evershed, M R in *Townsend (Builders) Ltd* v *Cinema News etc , Ltd* , (1957) 1 W L R 119, 124

21 *Adler* v *Deogan*, 251 N Y 467, 484

22 *Fender* v *Mildmay*, L R (1938) A C 1, 12

23 *Beresford* v *Royal Insurance Co , Ltd* , L R (1938) A C 586 in Appeal. L.R (1937) 2 K B 197, 219.

24 *Colgate* v *Batchelor*, (1596) Cro-Elis 872

25 *Nordonfelt* v *Maxim Nordenfelt etc , Co.*, L R. (1894) A.C. 535, 565

1 *Egerton* v *Brownlow*, (1853) 4 H L.C 1 at p 196.

2. *Fender* v. *Mildmay*, (1938) 4 A.C 1, 38.

and exceptionally refuse to enforce them . Certain rules of public policy have to be moulded to suit new conditions of a changing world "

The negative role of public policy tends to make contract not to move from its static role to a dynamic one to meet the challenge of ever-changing modern business and industrial relations. Trade Unions and Trade Associations, therefore, have their own regulations to guide them instead of seeking the aid of Court The need thus arose for a new machinery to protect the public from restrictive and monopolistic practices. The Monopolies and Restrictive Practices Act, 1948, enabled the appointment of a commission to investigate and report on those restrictive trade agreements which were referred to it by the Board of Trade. This led to the legislation called the Restrictive Trade Practices Act, 1956, which enabled the maintenance of a Register of agreements registrable under the Act, a Restrictive Practices Court where proceedings could be taken in respect of those agreements The registrable agreements consisted of those that carried on business in the United Kingdom in the production or supply or manufacture of goods The restrictions related to prices and control of supplies or manufactures and whether the restrictions were in public interest was justiciable in the Restrictive Practices Court, manned by Judges with experience in industry, commerce or public affairs If they were, they were declared void These provisions gave a major shake up in almost every section of industry.[3] This experiment in curtailing freedom of contract is so far found to be encouraging and an assessment as to the future could be done after giving the machinery a longer trial.

(e) **Executive Arrangements and Freedom of Contracts.**—Prof J D. B. Michell[4] amply explains as to how executive agreements are more in the nature of governmental directives than as enforceable contracts He says[5] "The Principle is simply that in the last resort the law permits a governmental agency to fulfil the fundamental purposes for which it was created, even though so doing may involve interference with vested contractual rights which an individual may have against that agency." The learned Professor adds· "The special purpose for which governmental agencies exist, the service of the community requires that on occasions those agencies must be released from or may be able to override, their obligations . This limitation of the obligation of Contract depends not on the acceptance of any particular theory of political philosophy but upon practical necessity."

An instance is furnished in the case **The Amphitrite**[6], where a Swedish ship in 1918, during the first world war was able to sail and deliver her cargo on the undertaking extended by the British Legation in Stockholm that at least sixty per cent of the goods should be approved goods But on its second voyage to England, clearance was refused to the ship as it was contrary to British practice. Basing its claim for damages on the undertaking given by the Legation, the ship-owners launched a suit which was rejected since no agreement can bind governmental essential actions.

In India, governmental freedom to enter into Contract is governed by the Constitutional Provision in Article 299 of the Constitution of India. The citizen is thereby assured of his remedy against Government provided the conditions in the said article are fulfilled Executive arrangements in India have been protected by the article to a great extent

3. See *Financial Times*, 7th January, 1959.
4. Contract of Public Authorities at p 17
5 *Ibid* at p 222
6. L R (1921) 3 K.B 500.

(f) The Evolution of the Modern Law of Contract.—We have adverted earlier that behind the Law of Conrtact there lay the simple moral Principle that a person should fulfil his promise and abide by his agreements. The early English Law did not however translate the moral principle into a legal one. It was in the nineteenth century that something like a general law of contract emerged under the impetus of the business or economic factor The economic and social urges of modern societies necessitated the proper development of the Law of Contract. For one thing the demands of labour necessitated transfers of property and performance of services. The growth of the Institution of credit was another factor for the development of the Law of Contract. In the words of Roscoe Pound "Wealth in a commercial age is made largely of Promises." Thus it is clear that the development of the Law of Contract grew up **pari pasu** with the development of Commerce. It is the Law of Contract that helped a man in his various duties, obligations and rights His banking transactions, right to occupy his own house rented or mortgaged, his shareholdings, relations with his servant or master, his own employment, his contractual obligations, his insurance, his purchases on hire purchase and many other things rested on the Law of Contracts for enforcement of his rights.

The traditional or classical theory of the Law of Contract can be said to have developed during the eighteenth and nineteenth centuries, which were the hey-day for the Natural Law Theory and the philosophy of **laissez-faire.** The Natural Law Theory postulated man's inalienable right to make his own contract and the **laissez-faire** philosophy stressed that law should interfere with people as little as possible. The Civil Law Judges played a negative role enabling citizens to 'realize their wills', without let or hindrance or interference by governmental or judicial authorities. The Law stepped in only when there was a breach of what was willed, and pulled up the defaulter of contractual obligations. The Judge was but a mere referee to see that the rules of the game were obeyed; the freedom of contract or the sanctity of contract had its fullest play. Sir George Jessel stated in 1875 that "if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."[7]

This phrase 'Freedom of Contract' was hard to define and even now is not fully understood All that the judges of the nineteenth century enunciated was that it was based on mutual agreement as a result of free choice. The test of agreement is objective and not subjective What is important is not what was really intended or agreed but what their conduct showed as indicative of agreement.

By the end of the classical period the objective approach was deemed conclusive as to agreement, assent or intention in the law of contract. Some Judges were however inclined to dwell more on consensus of the mind as necessary for a genuine agreement. The objective approach of the classical period has only been intensified in the modern period of the twentieth century. Nevertheless the tendency of the nineteenth century Judges relying on intention of parties as leading to the solution of a dispute had not disappeared altogether. Matters as contractual capacities of parties or illegality of contract were outside the range of 'intention of parties'. But the following were deemed to be inside that range. Whether there was a contract at all, the legal results of the contract, if the agreement was a valid legal contract, the interpretation of the parties' language, and the law of what country was to govern the contract. What exactly does one mean by saying that a contract is

7. *Printing and Numerical Registering Co.* v. *Sampson,* (1875) L.R. 19 Eq. at 465.

the outcome of a free choice? Here again political and economic theories of the day had an influence more than what a Judge thought and the latter always thought in a restricted way. In its widest sense the term meant that the liberty of a person to make any contract with whomsoever he pleased could in no way be curtailed. There was no legal obligation to enter into a contract. The exception to this in the nineteenth century was the person having a common calling as the 'Innkeeper' or the 'Common Carrier'. They were bound legally to contract with members of the public who demanded their services. Industrial and Commercial competition did provide a freedom of choice. But this became restricted on the introduction of the Railways and public utilities. Monopolies sprang up and this eliminated competition and freedom of choice to a large extent Then again the overriding 'Public interest' or public policy was another damper on freedom of contract even in the nineteenth century. The other damper was legislative interference such as the Truck Act of 1831 and the Gaming Act of 1845.

So slowly the freedom of contract of the early classical age was taking different hues as nineteenth century came to an end, consequent on rapid economic and social changes. Intention of Parties which governed an agreement often tended to be a fiction. For a contract came to be terminated if it was impossible of performance. This impossibility gave the death blow to intention of parties in so far as performance was rendered impossible through some extraordinary event occurring without the fault of either party. This doctrine of 'Frustration of Contract' propounded in 1863 discovered an 'implied term' in the original contract, as some kind of 'presumed intention of parties'. Acting on this doctrine Courts dissolved a contract on account of 'frustration'. The law was developing so fast and society progressed in such a complex way, that 'intention of parties' was torpedoed in the process.

Let again standardisation of law tended to eclipse the rule of 'intention'. This was clear in matters of sale of goods, insurance, etc. The duties of the buyer and seller were analysed and standardised and finally codified into the Sale of Goods Act. The result was there was no need to go into intention of parties as the statute had codified the various duties of buyer and seller. However, intention of parties could vary or exclude such statutory duties by express agreement as provided in the statutory provision.

The freedom of choice theory suffered from social and economic onslaughts in the shape of unemployment, scarcity of water and gas, difficulty in transport, the railways being the only facility in long distance travel in the nineteenth century There was no option but to enter some employment get water and gas on certain terms and travel by railways only The equality of contracting parties in the concept of freedom of choice which governed the classical law of contract, tended also to diminish Minors, or Lunatics were not equals and had to be specially provided for As trade unions were then prohibited the employer had the upper hand Small business was no match to big combines or monopolies as the Railway.

The concept of sanctity of contract was but a facet of 'freedom of contract' That sanctity vanished in the presence of fraud, undue influence, duress or contracts designed to violate the criminal law Legislation interfered in such cases more than the judiciary The 'absolving power[8] of the Court appeared to step in the development of the doctrine of frustration towards the end of the nineteeth century.

---

8 *See* Lord Loreburn in *Tamplin S. S. Co.* v. *Anglo Mexican Petroleum Co., Ltd,* (1916) 2 A.C. 397 at 404.

On the whole during the nineteenth century, the sanctity of contract was enforced legally The Judges interfered only when there was an obvious frustration of contract. They (the Judges) had yet to understand that the law should go in aid of persons entering into harsh or burdensome contracts.

The dawn of the twentieth century heralded vast changes in political, economic and social fields. The doctrine of **laissez-faire** crumbled. The Law of Contract was no more negative but positive for the achivement of justice. Unfair contracts due to economic or social pressure was looked down. No longer was the agreement of parties sacrosanct in all details. The introduction of **standard form** contract blew up the theory that the details of contract should depend on the actual agreement. The party was generally hustled or compelled by circumstances to get into such standard forms of contract as otherwise he cannot get any service, say, electricity, gas, purchase of car on hire purchase, etc., The terms and conditions for travel by Air or Railway were fixed by the monopoly and the party had no other alternative than to bow down to it. His volition or desire or intention was of no account. He had to submit to the imposition of the standard form agreements, which controlled the place of Court action in case of breach, or penalty if a condition is violated. There was no choice about it. The organisation had all the advantage over the individual and introduced exemption clauses which made the organisation immune from all liability in any circumstance. There was thus no mutuality, or choice and very little left for the intention of the individual House building societies, leases by Local Authority, Licences, Hire Purchase Agencies had their own standard forms which compelled acceptance. Their advantages were that they saved time, trouble, and expense in bargaining over terms. The Courts, however, felt the need to interfere whenever it was necessary. The standard form which gave freedom to the organisation to choose the law which should govern the transaction was not to the acceptance of the judges. Yet again the doctrine of frustration was freed from its fictitious dependence on intention of parties as could be seen in the House of Lords pronouncement in **Davis Contractors v. Fareham U. D. C.**[9].

"........ But it may still be of some importance to recall that, if the matter is to be approached by way of implied term, the solution of any particular case is not to be found by enquiring what the parties themselves would have agreed on had they been, as they were not, forewarned. It is not merely that none can answer that hypothetical question, it is also that the decision must be given irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances [10] The legal effect of frustration does not depend on their intention or their opinion, or even knowledge as to the event.[11] On the contrary, it seems that when the event occurs the meaning of contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but what the parties, as fair and reasonable men, would presumably have agreed upon, if having such possibilities in view, they had made express provision as to their several rights and liabilities in the event of its occurrence [12] By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace In their place there rises the figure of fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of **Justice**, is, and must be the Court itself."[13]

9. (1956) A C 696.
10 *Hirji Mulji* v. *Cheong S. S. Co.,* (1926) A C 497 at 510.
11 *Ibid* at p 509.
12. *Dahl* v *Nelson, Donkin & Co,* (1881) 6 App Cases 38 at 59.
13. (1956) A C. at 728.

The above opinion makes it clear that the Court can no more be guided by the intention of parties and come to its decision as a rule of law as to what the parties reasonably agreed or intended. The doctrine of frustration was thus developed. Intention of parties was subordinated to interests of Justice. Freedom of Contract was getting restricted as in the case of a person compelled to joint a trade union to earn a livelihood, or a retailer being compelled to contract with a wholesaler to ply his occupation, or a householder compelled to contract with suppliers of gas and electricity. Monopolies and standard forms were the further curb, necessitating the Restrictive Practices Court Companies, partnerships, etc., further eliminated individual contract The individual could however yet deal personally and exercise his freedom in purchase or sale of house, car, etc. The object of legislation was to reduce the hardships to the weaker of the two, **e.g.**, tenancy legislation (tenant to be protected from Landlord), Hire Purchase Act, 1938 (Protection to purchaser), Money-Lenders Act (Protecting the borrower), and Legislation regarding price control of certain goods (protecting the consumer). What is merely a breach of contract or a cause of legal action, was sometimes made criminal to protect the consumer—**vide** Merchandise Marks Act, 1887-1953. Statutes sometimes prohibit the 'exemption clause' in standard forms.

The modern Law of Contract does not altogether erase the concept of agreement and intention. The ancient too much emphasis, is alone taken away in the interests of justice. Parties have now a right to vary or exclude the normal rules by express agreement The classical principles are yet there. Modern Law's weakness is that the changes are only piecemeal here and there. The basic principles of nineteenth centry as revealed by the judgments of that period do remain in the main. Intention is yet divined by Judges to decide many issues. The tendency to treat standardform contract or exemption clauses as normal is to be deprecated. They are only exceptional occurrences and must be subordinated to accepted Principles of Contract.

(g) The future of the Law of Contract.—Sir David Hughes Parry[14] took into account the opinion of Morris, L J.[15] that though the history of the Law of Contracts fascinates and the theory and principles of its philosophy are rich in interest, 'the interest of the litigant is in his own case.' Parry then observes:

"All this bides me to the view that we must at all times keep in mind the question whether the time is not fast approaching when the whole structure of contract law with its preconceived ideas and nineteenth century doctrine, has not become so rigid and static that it cannot be expected to bear on all fronts the strains and stresses of modern economic and social pressures."

One feature of the past in Common Law has been its stability and fixity of its legal machinery. The rule of precedents has come to stay. Rightly, Judge Cardozo[16] has declared "what has once been settled by a precedent will not be unsettled overnight, for certainty and uniformity are gains not lightly to be sacrificed, above all is this true when honest men have shaped their conduct upon the faith of the Pronouncement " But it has to be admitted that the changes in social and economic sphere have been so fast that law should not be allowed to lag behind.

We have to note that recent trends in collectivisms are the restrictive operation on the Law of Contract, Legislative measures do curtail pre-existing rights, **e.g.**: Landlords and tenancy legislation, Master and Servant Law, and Law of Overseas

14 Sanctity of Contracts in English Law, p 71.

15. 'On Law and Public Opinion' at p 3 (Address to the Holdsworth Club).

16. 'In Paradoxes of Legal Science', pp. 20-30.

Trade When man is social he is cooperative while he is competitive in his individual needs and the demands of society and how far Government can interfere in the individual's freedom Professor Friedman[17] rightly points out that the theory of separation of powers has been accepted by the Judges in England. They would leave to the Legislature the application of legal policy But in America, the Supreme Court often influenced American Social Policy The statutory output in England left a field for interpretation for Judges who had necessarily to uphold established legal principles while trying to reconcile between the claims of the individual and the needs of society They had to readjust old principles to new needs or situations.[18]

The old respect of the individual for his contractual obligations, is not so much in evidence in modern days Non-performance of obligations found support in the development of the doctrine of frustration The demand for the relaxation of the strict letter of the contract to relieve hardships and the importation of terms if performance was insisted upon, was more in evidence. Defences of illegality or immorality or public policy helped a party who desired to back out from his pledged word.

The Legislature and the Courts have also imposed certain restrictions on the freedom of contract for reasons of Government or Public Policy. The standard-form agreements are too common in a highly developing commercial society, with the result that the customer is negatively drawn into it by force of circumstances. He is amazed later when he is told he cannot get from Court the relief he wants on account of the technical term in the contract or on account of the 'exemption clauses' placing the promisee in an undesirable advantageous position. The question therefore arose whether such clauses are fair, and instances there are where legislation had to step in to veto such oppressive clauses.

The complexity of modern activities makes it also difficult to provide for all eventualities. It is therefore difficult to solve the riddles of the Law of Contract overnight. The existence of the problem is a sure indication of the growth of that law. Mr Justice Holmes rightly observed "The Law is always approaching and never reaching, consistency. It is forever adopting new principles from life at one end and it always retains old ones from history at the other ... . it will become entirely consistent only when it ceases to grow."[19]

---

17. Legal Theory, 3rd Edn at p 334
18. *See* Lord Mansfield 'Law and other Things' at pp 38-54.
19. Cited in 'The Sanctity of Contract,' p 77.

FREEDOM OF PROFESSION AND STATE MONOPOLY.

By
V. B AWASTHI, LL M., *Lucknow University.*

As disclosed by the Survey of Prof Mortimer J. Adler[1], three different meanings can be attributed to the word 'freedom.' The first is the freedom of circumstantial self-realization possessed by any individual who is able to act as he wishes for his own good · the second is the freedom of self-perfection possessed by only those who are able to will or live as they ought in conformity to the ideal befitting human nature and the third is that of self-determination possessed by all by virtue of a power inherent in human nature whereby a man is able to change his own character by deciding what he shall do or shall become. Freedom, thus, though intrinsic in character is always situational and not a fixed whole like an apple pie into which the law cuts and with each cut takes a piece away

In India the cry for freedom was made from time to time during the period preceding the independence. A question much debated at the three Round Table Conferences[2], and also adverted to in the reports of the Simon Commission[3] and the Joint Select Committee on the Government of India Bill, 1935[4], was the advisibility of including a 'Bill of Rights' guaranteeing certain basic freedoms to the people of this vast country Though it was almost natural for people bred in the tradition of Dicey's third meaning of the Rule of Law, to regard such guarantees useless or futile, such was the fervour that even they had to condescend to the inclusion of guarantees against discrimination on grounds of religion, descent, caste, colour or place of birth in respect of, among other things, 'holding public office or practising any trade, profession or calling' in section 298 of the Government of India Act, 1935

In the same strain the Constituent Assembly convened to frame a Constitution, too, adopted after its first meeting a resolution wherein was guaranteed and secured to all people of India among other things the freedom of vocation which was included among the Fundamental Rights guaranteed in Part III of the Constitution. Article 19 enumerates seven distinct avenues of liberty guaranteed to the citizens of this country That they are the strands of the same fabric is beyond doubt, for liberty denotes not merely the freedom from bodily restraints but the right of the individual to enjoy all those privileges which are essential to the ordinary pursuit of happiness by free men including among ohters the right 'to engage in any of the common occupations of life'[5] Thus Article 19 (1) (*g*) provides .

" (19 (1) All citizens shall have the right—

(*a*) ....
(*b*) ....
(*c*) ....
(*d*) ....
(*e*) ....
(*f*) ....

---

1 Mortimer J Adler . 'The idea of Freedom—Dialectical Examination of the Conception of Freedom' New York, 1958.

2. *See* Report of the Indian Round Table Conference . 3rd Session, 1932, p 62, 63

3. *See* Report of the Statutory Commission, Vol 2, Para. 36, pp 32, 33

4 *See* Report of the Joint Select Committee on Indian Constitutional Reform : Para. 369 at p 217.

5 *Meyer* v. *Mebraska*, (1923) U S 390 at p. 399.

(*g*) to practise any profession, or to carry on any occupation, trade or business

It is later followed by clause (6) of the same Article which enumerates the nature of restrictions that can be imposed by the State upon this right and which at the time of the adoption of the Constitution ran thus .

> "*Clause* (6).—Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercis of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

But perhaps as the then party in power believed that the clause might not countenance their attempts at large scale nationalization to create a public sector in the economic organization of the nation, they amended it by the Constitution First Amendment Act, 1951 so that now the latter portion of the clause runs thus :—

> ". ... . and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far it relates to, or prevent the State from making any law relating to,—
>
> (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
>
> (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise "

The creation of a monopoly in favour of the State impairs a citizen's right to carry on any trade or business guaranteed under Article 19 (1) (*g*) for such an act ousts others from that calling wholly or partially. Under the original clause (6) such action on the part of the State was justified only if it was reasonable As early as 1951, in *Moti Lal* v. *U P.*[6], the Allahabad High Court held that nationalization cannot be carried on by executive act and the provisions of the Motor Vehicles Act did not envisage State monopoly. In this case, the applicants who were bus-owners carried passengers for hire They were given notices informing them that all permanent permits issued to them would be deemed to be valid only upto a certain date and thereafter they would be granted temporary permits The bus-owners, however remained reconciled to their fate and up to 30th March, 1960, they continued to apply for renewals and temporary permits continued to be granted to them. The Government, in the meantime, started running buses of their own and when they were in a position to put a sufficient number of buses on a particular route, the Regional Transport Authority gave notices to the bus-owners that the Roadways would commence operation with effect from a certain date and the passenger buses belonging to the applicants would cease to operate on the said route with effect from that date. The bus-owners contended that the State had no right to carry on any business without legislative sanction and that in the instant case there was no such sanction for running buses on hire The whole activity was therefore held illegal

6. A I R 19.1 All. 257.

Then came an Orissa case[7], where the Orissa Motor Vehicles Act, 1947, was challenged on the ground that Article 19 (6) does not envisage prohibition and that nationalization is not a reasonable restriction. The Court opined that road transport is a public utility and in this respect a monopoly is always more advantageous to the public than free competition. Besides the defects of monopoly disappear when it is that of Government or Government controlled agency, for it can provide more amenities, even run unremunerative services and provide effective co-ordination. This will result in more efficient management and administration of transport services.

Three years later in an appeal case from Allahabad High Court[8] the Supreme Court agreed that a State monopoly is *per se* reasonable but the restrictions must be judged in their own setting of time and circumstances. It is not sufficient to show that it is conducive to the public interest. The normal use of the word 'restriction' seems to be in the sense of limitation and not extinction. The Court, however, declined to express any final opinion upon this matter.

This was followed by the amendment. In fact, the framers, while drafting Article 19 (1) (*g*), apparently thought that the monopoly laws would be protected by clause (6) of the Article 19 but when that assumption was frustrated, the amendment was brought and the clarification of intention was made by using the words 'in particular.' The words show that State monopoly and nationalization are examples of reasonable restrictions in the interest of general public and that is why the matters seem to be justifiable.

Explaining the effect of the Amendment, the Allahabad High Court[8] in 1954 observed that the amendment does not make the establishment of such monopolies a reasonable restriction within the meaning of the first clause of Article 19 (6). The result of the amendment is that the State would not have to justify such action as reasonable in a Court of law and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Article 19 (1) (*g*) of the Constitution. The Court further observed that since a State has resources in terms of capital and technical knowledge it alone can provide better co-ordination. Consequently a monopoly cannot be called unreasonable if the Legislature has thought it fit to create. The Supreme Court also in[9] one of its judgments held that the first amendment enabled the State to carry on trade or to carry it on through a Corporation owned or controlled by the State to the exclusion of the citizens, complete or partial. This was later endorsed in another case in 1960[10].

Following these verdicts of the Supreme Court, the Bombay High Court[11] has held that the first amendment to the Constitution does entitle the State to create a monopoly and to that extent the right guaranteed to the citizens is subordinated to the right of the State to create monopoly in its own favour.

---

7. *L. N. Misra* v *State of Orissa*, A I R. 1952 Orissa 42.

8. *Saghir Ahmad* v. *State of U P.*, (1954) S C.J. 819 . (1955) 1 S C.R. 707 : A.I R. 1954 S.C. 728.

9. *G. Nageshwar Rao* v *APSRT Corporation*, (1959) S C J. 967 : (1959) 1 S C.R (Supp.) 319 : (1959) 2 An W.R (S C) 156 (1959) 2 M L J (S C) 156 A I.R 1959 S C 308.

10. *Parbhani Tr. Co-perative Society* v. *R T.A* , (1960) S C J. 1250 . (1960) 3 S C.R 177 : A.I.R 1960 S C 801.

11. *Parbhani Tr. Co-operative Society* v. *Vedekar*, A.I.R. 1960 Bom. 278.

Sub-clause (2) of Article 19 (6) imposes no limitation on the power of the State to make laws conferring monopoly on it and the State is thereby exempted from the condition of reasonableness which might in cases result in the infringement of the rights guaranteed under Article 19 (1) (*g*) In other words, the creation of State monopolies shall not deprive a citizen of the freedom of trade and occupation. But this is possible only when there is a law to this effect and if in the absence of such a law the Deputy Commissioner by a notice stops plying of private vehicles of certain routes for they were going to be nationalized, the notice was held to be an infringement of Article 19 (1) (*g*). A law for nationalization cannot at any rate be imposed by executive fiat[12]. The Assam High Court has also held[13] that nationalization without the authority of law is an infringement of Article 19 (1) (*g*).

According to the words used in the Amendment the monopoly created by a State may be either whole or partial, so that where it was contended that it is not open for a monopolization law to nationalize only a part of the service the Supreme Court held[14] that it was wrong to say so, for, the words of Article 19 (1) (*g*) are wide enough to cover partial nationalization also

The amendment enables the State to carry on any trade or business by itself or through a Corporation owned or controlled by the State. The Supreme Court was required to explain the word 'itself' in *Akadasi* v. *State of Orissa*[15], where the petitioner contended that the Government cannot carry on monopolies through agents Elucidating the intention of the framers the Court observed that as the State can carry on its business through its departmental officers, similarly it can do so through its agents as well. In this case the validity of the Orissa Tendu Leave (Control of Trade) Act, 1961, was challenged. The Preamble of the Act provides that the enactment was just to regulate trade in tendu leaves by creating a monopoly in it. Under section 3 of the impugned Act no person other than the Government Officer so authorized or an agent of Government shall purchase or transport tendu leaves. The Government was also empowered to fix minimum prices. The petitioners mainly contended that such provisions infringed Article 19 (1) (*g*) and that the Government cannot carry on monopoly through agents. They also contended that clause (6) of Article 19 is only permissive in its character permitting the State to create a monopoly by law but is not a bar to the judgment of such monopoly by any standard of reasonableness. The respondents contended that Article 19 (6) prohibits a challenge to a law creating monopoly on grounds of all the freedoms incorporated in Article 19 (1).

Gajendragadkar, J, basing his observations on a liberal approach, held that to a socialist the notion of State ownership is a matter of principle and its justification lies in the notion of social welfare To a rationalist it is a matter of expediency dominated by considerations of economic efficiency and increased output. The first is doctrinaire while the other is pragmatic The former proceeds on the general ground that all national wealth and means of producing it should come under national control whilst the second supports nationalization on grounds only of effici-

12 *C V T Ltd.* v *State of H P*, A I R 1953 H P 8.

13 *Madhav Chandra* v *R T. A.*, A I.R. 1954 Assam 212.

14 *Kodanda Rao* v *State of Andhra Pradesh*, (1960) S.C.J. 87 : (1960) 1 S C R. 749 : (1960) M L J (Crl) 32 A I R 1960 S C 82.

15. A.I.R. 1962 S.C. 1047.

ency and increased output. The first amendment shows that a law relating to creation of a monopoly of the State should be presumed to be reasonable and in the interest of the general public No limit is placed on that power. This clearly shows that the amendment has been based on the doctrinaire approach and hence it indicates that a law in respect of State monopoly of any trade, business or service must be presumed to be reasonable in the interest of general public It is interesting to note that Gajendragadkar, J, while delivering the Lala Lajpat Rai memorial lectures for the year 1964 has observed .

> " Incidentally, the amendment made by the addition of sub-clause (ii) to Article 19 (6), *prima facie*, seems to justify nationalization on consideration of pragmatism and not on the doctrinaire ground that nationalization in every case is good, sound and valid."[16]

What a problem for a Realist?

In fact monopoly is just an exception to the guarantee of Fundamental Right and an unduly wide connotation should not be given to it. The Court should at the outset enquire whether the provisions are basically and essentially necessary for creating the State monopoly It is only these provisions that are protected by the amendment Incidental provisions will not fall under it and will have to stand the test prescribed in the first part of Article 19 (6) What are essential provisions for the creation of a monopoly is a question of fact and will vary with the nature of the trade or business, the nature of commodity and various other circumstances.

It shall not be out of place to mention that the Supreme Court in this case has accorded an unusually literal interpretation of the amendment. The approach has in its effect converted a restriction into an exception which was possibly not at all intended by the framers The Court has shown itself to be more doctrinaire than the Government which is the champion of mixed economy. It is somewhat incongruous that on the one side it claims to be the patron of social welfare while on the other it has held State monopoly to be an exception to the guarantee of Fundamental Right. What was expected, was a narrow interpretation of the provision which ought to have made the programme of nationalization or State monopoly a subject of judicial scrutiny and demanded a justification of the same on the edifice of economic progress. Instead, it has strengthened the hands of the Government with a double-edged weapon which can be used by it, both benevolently as well as malevolently. It is hoped that the Court may at some later stage realize the seriousness of its observations in some suitable context.

Besides the verdict of the Court has reduced the word ' any ' used in Article 19 (1) (*g*), to a superfluous state and an interpretation by which any part of a provision becomes superfluous should have been avoided. The interpretation under reference now appears to mean that a citizen is not free to take up ' any' profession, trade, or occupation but is allowed to pursue only such callings as the State does not prefer to take up for itself Had that been so, the amendment ought to have been introduced in Articles 19 (1) (*g*) instead of Article 19 (6) which would have made the picture more vivid in the first instance. The amendment, as it stands today, may thus safely be said to be an untold curtailment of the term ' freedom ' and it might be difficult to justify it in cases that might ensue in times to come

---

16. Gajendragadkar, P. B. 'Law' Liberty and Social Justice, 1965 Ed. at p. 96.

LORD DENNING'S VISIT TO THE HIGH COURT.

The visit of Lord Denning, M. R, Sir John Passmore Widgery, and Sir Frederick Elvyn Jones, Attorney-General of England, to the High Court on 6th January was quite a pleasurable event Lord Denning is not a stranger to the City. This is his second visit to Madras Among the present day British Judges, his name is, perhaps, the best known to the members of the legal profession . Members of the Bar all over India hold in great esteem the names of a number of eminent British Judges for their mastery of law, juristic erudition, imaginative approach and courageous application of legal principles To mention but a few, Mansfield, Blackburn, Macnaghten and Atkin are some of the most honoured names respected for their valuable contribution to the development of the law Throughout his judicial career of more than two decades first as a Judge of the High Court and later as a Judge of the Court of Appeal and thereafter as a Lord of Appeal in Ordinary and now as Master of the Rolls, Lord Denning has delivered judgments outside the conventional mould dissenting from his colleagues on many an occasion. His judgments are always stimulating and provoking thought They have the flair of original approach and endeavour to give a new orientation to well-known principles. The doctrine of consideration, the doctrine of consensus *ad idem* as the basis of contract, third party rights in contract, the doctrine of frustration and other topics have received a new look at his hands His judgments display an awareness of the fact that in a changing society the law cannot be stationary, that no formulas in law are final, that the resultants of a past generation seldom adequately measure the opposing forces of the next and that though a Judge does not have the freedom to experiment that a scientist has in his laboratory he can within the limitations operating in regard to his sphere of work transmute his experience into law and create new principles. It may be said justifiably that Lord Denning often imparts a ferment in his judgments, a mark of genius.

In his address to the members of the Bench and the Bar, Lord Denning expressed his pleasure at the manner in which the Bench and the Bar had been establishing the rule of law in this country He reminded them of the fact that the Common Law was a common heritage of both England and India and formed the base on which the rule of law rested It may be recalled that Lord Denning chose as his subject for the first Hamlyn Lectures " Freedom under the Law ". The rule of law signifies that ours is a government of laws and not of men The responsibility of the Bar, in the context, demands that the Bar should retain an intellectual sensitivity to and an emotional concern about any encroachment on personal freedom and individual liberty regardless of whose they may be Lord Denning stressed the need to uphold the dignity, independence and integrity of the legal profession and to present cases courageously and honestly without suggesting anything that was untrue Lord Denning also stated that the members of the Bench and the Bar would do well not to confine themselves to legal work alone but should equip themselves with a wider background in literature and history The lawyer is ill-equipped who only knows the rules of his craft and can only speak the language of his art Pleydel's remark in

Scott's Guy Mannering that a lawyer without a knowledge of literature is a mere mechanic found an echo in the advice given by the Master of the Rolls It is interesting to note that Lord Oxford and Asquith—himself a great lawyer—in one of his rectorial addresses observed: "There is hardly a sight or sound in nature, a passion or emotion or purpose in man, a phase of conduct and achievement of thought, a situation in life, tragic or comic, pathetic or ironical, which is not illuminated for him by association with the imperishable words of those who have interpreted with the vision and in the language of genius the meaning of the world " As regards the need for a knowledge of history, Bacon's remark that "history makes men wise" has a considerable modicum of truth In the felicitous language of Morris, L J : " Happy is the lawyer who has the knowledge of the history and the story of the former days The more ample learning of those acquainted with the unfolded story of the deeds and misdeeds, and the triumphs and disasters of men gives them perception more vivid and more discerning than that of those not similarly equipped". But alas! advice is often given but good advice is seldom taken It is to be hoped that those who are earnest about practising the profession of law will profit by the advice given

Sir Frederick Elvyn Jone's humorous remark that the existence of a lighthouse in the campus of the High Court may be a source of inspiration and that the members of the Bar would generate more light than heat in their argument does not mean that with a shifting of the lighthouse to other premises,—as seems to be in the offing,—the inspiration will vanish or that the members of the Bar will cease to shed more light than heat in the discharge of their duties.

OMBUDSMAN IN MAURITIUS.

By

JOSEPH MINATTUR, PH. D (LONDON), LL D (NIMEGUEN), D C L. (F.I E.D C , STRASBOURG), *of Lincoln's Inn, Barrister-at-Law.*

"From one citizen you gather the idea that Mauritius was first made and then heaven, and that heaven was copied after Mauritius," wrote Mark Twain.[1]

What served, according to this report, as a model for heaven, may not be too bad for Bharat, provided the latter remembers while following the model that the dress has to be made to measure. The fact that two-thirds of the population of Mauritius is of Indian origin may be considered another reason for Indians' taking interest in an institution which appears to have been well received in that little island. Blood is thicker than the waters of the Indian Ocean.

The Constitution of Mauritius, annexed to the Mauritius Constitution Order, 1966, has a chapter devoted to Ombudsman, dealing with the office of Ombudsman, his jurisdiction, the procedure to be followed in his investigations, etc.

Though these provisions were, in the main, modelled on the (New Zealand) Parliamentary Commissioner (Ombudsman) Act, 1962 and the (Danish) Om Folketing Ombudsman, 1954, there are significant departures from these models. The (British) Parliamentary Commissioner Act, 1967, has some provisions which are identical with those in the Mauritian Constitution, but the British Statute is comparatively very limited in its application. The explanation for it appears to be twofold (i) In Britain, to quote from the Command Paper, "Parliament is the place for ventilating the grievances of the citizen—by history, tradition and past and present practice. It is one of the functions of the elected Member of Parliament to try to secure that his constituents do not suffer injustice at the hands of the Government".[2] The U. K. Government did not propose to replace the remedies which the Constitution already provided, but intended to develop those remedies further. All that the Government therefore envisaged was to "give Members of Parliament a better instrument which they can use to protect the citizen, namely the services of a Parliamentary Commissioner for Administration."[3]

(ii) The U. K. Government do not think that the administration of Government departments is open to serious criticism and that injustices are frequently suffered by individual citizens. They are in no doubt that the tradition of integrity and impartiality in public administration is being fully maintained.[4] The proposal to appoint a Parliamentary Commissioner was intended to increase public confidence in that administration.

Where conditions are dissimilar, it may be found necessary to adopt different provisions. The Mauritian provisions, though they do not contemplate certain matters envisaged in the Lokpal Bill (for instance, Ombudsman's jurisdiction over Ministers and Parliamentary Secretaries) cover a wider field than the

---

1. Quoted in J N Roy, *Mauritius in Transition*, (1960), p. 1.
2. *The Parliamentary Commissioner for Administration*, 1965, cmnd. 2767, p. 3.
3. *Ibid.*
4. *Ibid* p. 7.

U. K. Act. The provisions which are not found in the British statute may be of special interest and importance to the Indian public, particularly the legislator who has to consider a piece of proposed legislation in the light of Indian conditions. He will find that the Indian citizen has more affinity with his Mauritian counterpart than with the one in the U. K., mainly because of the difference in social concepts and political traditions.

In Mauritius as in the United Kingdom, the Ombudsman is not empowered to investigate administrative action (or inaction) of Ministers and Parliamentary Secretaries. But this exemption from jurisdiction appears to have been envisaged as a temporary and transitional measure. The Constitutional Commissioner for Mauritius reported in 1966:

"I found that there are differences of opinion over the question whether he should be empowered to investigate the acts and decisions of Ministers themselves. In view of this conflict it might be better to exclude the personal acts and decisions of Ministers from his purview **in the first instance.**" (Emphasis added)[5].

This recommendation for exclusion of ministers in the first instance was on the basis of a compromise to accommodate conflicting views rather than on any concept of ministerial responsibility. For the Commissioner made it very clear that

"Far from weakening the principle of ministerial responsibility he (Ombudsman) could make it more efficacious".[6]

It is of interest to note that in Guyana where Ministers are responsible to Parliament,[7] the Ombudsman's jurisdiction extends to Ministers among others.[8]

In New Zealand where the Ombudsman's jurisdiction does not extend to inquiring into the decisions of Ministers, any recommendation made to a Minister by a department or agency, even if the Minister has already acted upon it, may be inquired into and, if necessary, reported upon by the Ombudsman.[9] In the light of the Ombudsman's findings, the Minister would eventually be called upon to justify his actions in Parliament and thus he would be obliged to account for his administrative acts.[10] And the New Zealand Ombudsman reports that "so far there is no cause to feel that the parliamentary principles of ministerial responsibility are likely to stand in the way of the effective operation of the Ombudsman, or themselves to suffer by reason of his activities."[11]

The organs of Government which may be excluded from the jurisdiction of the Ombudsman are the judiciary and the Service Commissions. In Denmark the deputy judges were under his jurisdiction in the first instance; later on, when this was found to be inexpedient, they as well as other judges were excluded from his jurisdiction by an amendment of the Ombudsman Act in 1959.[12]

If he is empowered to investigate the recommendations or decisions of Service Commissions, the Commissions would be obliged to give reasons why A

5. S A de Smith, *Report of the Constitutional Commissioner* (Mauritius Legislative Assembly, Sessional Paper No. 2 of 1965), p. 13.

6. *Ibid*, p. 11.

7. Constitution of Guyana, section 35.

8. *Ibid*, section 53.

9. Sir Guy Powles, "The Office of Ombudsman in New Zealand", *Journal of Administration Overseas*, (1968) 287 at 288.

10. *Ibid.*

11. *Ibid.*

12. Act No. 205 of 11th June, 1959. *See* Stephan Hurwitz, "Denmark's Ombudsman: The Parliamentary Commissioner for Civil and Military Government Administration," (1961) *Wisconsin Law Review*, 169 at 171.

was appointed to a post while B was not. This would be very difficult, perhaps impossible to do in some cases. Appointments might depend on factors difficult to define. The burden cast upon the Commission which is already overladen with heavy responsibility will become insupportable.[13]

In Mauritius the following officers and authorities are excluded from his jurisdiction:

(i) The Governor and his personal staff,

(ii) the Chief Justice,

(iii) any Commission established by the Constitution and their staff,

(iv) the Director of Public Prosecutions or any person acting under or in accordance with his instructions,

(v) any person exercising powers delegated to him by the Public Service Commission or the Police Service Commission.[14]

The Constitution further provides that in cases where the Premier gives a written notice to the effect that the action complained of was taken by a Minister or Parliamentary Secretary in person in the exercise of his own deliberate judgment, the Ombudsman is precluded from conducting an investigation of the action in question. This appears to be a provision fraught with serious peril for the citizen. When Ministers and Parliamentary Secretaries are made immune from investigation, the Ombudsman's functions may prove ineffective in many cases, as Ministers and Parliamentary Secretaries can insulate any matter from the Ombudsman's authority by either making a decision or giving an order personally or claiming that they have personally made the decision or given the order [15]

The Ombudsman in Mauritius is to be appointed by the Governor after consultation with the Premier, the Leader of the Opposition and such other persons, as appear to the Governor acting in his discretion, to be leaders of parties in the Legislative Assembly.[16] These consultations emphasize the representative character of the Ombudsman [17] But he shall not be a member of the Legislative Assembly or any Local Authority or a Local Government Officer, nor shall he perform the functions of any other public office.[18]

He is empowered to investigate any action[19] taken by any officer or authority[20] in the exercise of administrative functions in any case in which a member

---

13. *See de* Smith, *op. cit*, page 13.

14 Section 92 (1) (*d*) of the Mauritius Constitution Order, 1966.

15 *See* B Christensen, "The Danish Ombudsman", 1961 *University of Pennsylvania Law Review*, 1100 Prof H W R Wade has remarked that "The doctrine of ministerial responsibility makes it difficult for a minister to admit that he has made a mistake—or which is more dangerous still, that his department has made a mistake the Minister will do what he can, out of natural loyalty, to protect his officials from censure Minister and department play together as one team and each will try to avoid letting the other down They therefore present a firm front " *Towards Administrative Justice*, page 99 Prof. Wade is referring to the usual stand taken by Minister and department in regard to parliamentary question ; the general attitude indicated may be adopted in relation to Ombudsman's investigations also.

16. Section 91 (2).

17 In Swedish the word means a representative, a solicitor The Danish Ombudsman Act of 11th June, 1954, section 1 speaks of a Parliamentary Commissioner who, *on behalf of the Folketing* (Parliament) shall supervise the civil and military government administration." (Emphasis added).

18. Section 91 (3) —In Denmark his independence is stressed when the Act of 1954 provides that subject to the rules laid down by Parliament for the conduct of his activities, he is independent of Parliament (section 3) These rules issued in 1956 serve to elucidate and amplify the provisions of the Act and they have not been varied or modified since

19. Action includes failure to act.

20. The following officers and authorities are exempted from his jurisdiction :

(i) the Governor and his personal staff;

of the public claims, or appears to the Ombudsman, to have sustained injustice in consequence of maladministration in connection with the action.[21] He may make the investigation upon complaint from the aggrieved party, or when invited to do so by the Governor, acting in his discretion, or by any Minister or other Member of the Legislative Assembly or on his own initiative[22] A complaint may be made by any individual or body of persons except certain publicly elected or appointed authorities.[23] It should be made either by the aggrieved person himself or in certain circumstances, (as when he is dead or unable to act for himself), by his personal representatives or some other individual who is suitable to represent him.[24] Legislative provisions may be made requiring, among other things, that complaints should be transmitted through a Member of the Legislative Assembly [25]

He is generally precluded from conducting an investigation when the aggrieved person has or had a right of appeal to a tribunal or a remedy in a Court of law. Nevertheless, he may conduct an investigation if he is satisfied that in the particular circumstances it is not reasonable to expect the aggrieved person to avail himself of that right or remedy [1] Further, he is not precluded from conducting an investigation as to whether any of the provisions relating to fundamental rights and freedoms of the individual has been contravened [2] This is complementary to the provision which enshrines a person's right to apply for redress to the Supreme Court if any of his fundamental rights and freedoms guaranteed by the Constitution has been, is being or is likely to be contravened in relation to him.[3] This provision appears necessary, as otherwise, he would not be able to investigate and report about administrative acts which are improperly discriminatory in character.[4] This will also help those who are unable, for financial or other reasons, to move the Supreme Court in relation to the act in question.[5]

He is precluded from investigating a matter if he is given notice by the Governor, acting, in his discretion, that the investigation of that matter would not

---

(ii) the Chief Justice;

(iii) any Commission established by the Constitution and their staff,

(iv) the Director of Public Prosecutions or any person acting under or in accordance with his instructions;

(v) any person exercising power delegated to him by the Public Service Commissioner or the Police Service Commissioner (section 92 (1) (*d*))

21. A complaint may be made by the following ·

(*a*) an authority of the Government or a Local Authority or other authority or body constituted for purposes of the Public Service or Local Government ,

(*b*) any other authority or body whose members are appointed by the Governor or a Minister or whose revenues consist wholly or mainly of moneys provided from public funds.

22 Section 92 (1).

23. Section 92 (1).

24. Section 92 (4)

25 Section 97 (*b*) —In the United Kingdom complaints have to be made through a Member of Parliament In countries where snobbery reigns supreme and only the voice of influence will be heard, such a provision may prove detrimental to the interests of the ordinary citizen

1 Section 92 (6) (i)—An identical provision is found in the (U K) Parliamentary Commissioner Act, 1967

2. Section 92 (6) (ii).

3 Section 15 (1)

4 *See* de Smith, *op cit*, page 14.

5 In Denmark the Ombudsman may recommend legal aid for a complainant who satisfies the necessary conditions, if in the opinion of the Ombudsman there is reasonable ground for bringing an action against a government or local government authority or against some one employed by any of these authorities *See* Directions for the Ombudsman, Article 7 (3) , *see* also Paul Hansen, "The Ombudsman", in *Denmark*, (1964) page 129 In the United Kingdom the attitude appears to be very different "Legal aid will not be available", says the White Paper on the *Parliamentary Commissioner for Administration* (cmnd 2767), page 6.

be in the interests of the security of the State [6] He shall not make any investigation when it appears to him that the complaint is vexatious or frivolous, that the subject-matter of the complaint is trivial, that the complainant has no sufficient interest in the subject-matter, or that the complaint has been unreasonably delayed for more than six months.[7]

The investigation is expected to be informal It is to be conducted in private The Ombudsman may obtain his information in any manner he thinks fit and may decide whether any person should be represented by Counsel in the investigation.[8] He is, however, required to afford an opportunity to the principal officer of the department or authority concerned and to any other person who is alleged to have taken or authorised the action in question to comment on the allegations in a complaint.[9]

The State is not entitled to claim any privilege in relation to the production of documents or giving of evidence as is allowed in legal proceedings[10], but information and documents relating to the proceedings of the Cabinet and of any committee of the Cabinet are privileged [11] When the Governor, acting in his discretion, gives notice that, in his opinion, the disclosure of any document or information specified in the notice would be against public interest in relation to defence, external relations or internal security, the Ombudsman and the members of his staff are not permitted to communicate to any person the specific document or information.[12] While no information or documents except those relating to the proceedings of the Cabinet or any of its committees are to be withheld from him, he and his staff are bound to observe secrecy in relation to certain specified matters when so required by the Governor, or under the provisions of any Act of the British Parliament in force in Mauritius.

When the Ombudsman is of the opinion that the action which is the subject matter of the investigation was.

(i) contrary to law,

(ii) based wholly or partly on a mistake of law or fact,

(iii) unreasonably delayed,

(iv) otherwise unjust or manifestly unreasonable, and

(a) that the matter should be given further consideration,

(b) that an omission should be rectified,

(c) that the decision should be cancelled, reversed or varied,

(d) that any practice on which the act, omission, decision or recommendation was based should be altered,

(e) that any law on which the act, omission, decision or recommendation was based should be reconsidered,

(f) that reasons should have been given for decision, or

(g) that any other steps should be taken,

he is to report his opinion, giving reasons, to the principal officer of the department or authority concerned, with his recommendation and request the official to notify him of the steps which it is proposed to take to give effect to the recommendations. He shall also send a copy of the report and recommendations to

---

6 Section 92 (9)

7 Section 92 (8) —In Denmark and in the United Kingdom the time limit is twelve months. In Denmark, according to Stephan Hurwitz, the present Ombudsman, the time limit does not prejudice the redress of a grievance as the Ombudsman can make an investigation on his own initiative at any time *See* section Hurwitz, " The Danish Parliamentary Commissioner for Civil and Military Government Administration ", *Public Law*, (1958), 236 at 241.

8 Section 93 (2)

9 Section 93 (1)

10 Section 94 (3).

11. Section 94 (4).

12. Section 94 (5).

the Governor and any Minister concerned.[13] If no adequate or appropriate action is taken by the deparmtent or authority, he may send a copy of his report and recommendations to the Governor.[14] Further he may make such report to the Legislative Assembly on the matter as he thinks fit.[15] He is required to make an annual report to the Governor concerning the discharge of his functions and it will be laid before the Assembly [15-a]

In the performance of his duties, he is not subject to the direction or control of any authority and his proceedings are not to be called in question in any Court of law.[16] But provision will be made by legislation defining offences in connection with the functions of the Ombudsman and his staff and prescribing method of trial and penalties for such offences.[17] Supplementary and ancillary provisions which may appear necessary and expedient are to be prescribed and they may include, among others, provision for the procedure to be followed by the Ombudsman in the performance of his duties [18]

The Swedish Ambassador to India is reported to have said that "........ it never seemed to us that it (the institution of Ombudsman) was exportable."[19] He may be right if by 'exportable' he meant to convey the idea of a blonde officer packaged and labelled "Made in Sweden". New Zealand's successful experiment with Ombudsman proves that the institution can be "received", as the common law has been "received", if not transplanted in different climates Sir Guy Powles, the New Zealand Ombudsman, claims that the New Zealand Parliamentary Commissioner for investigation is a "native product".[20] When the Ombudsman is transplanted in India his hair may grow black, his eyes may turn dark or dark brown, and he may put on a **sherwani** or **kurta**, according to his personal taste, and he may succeed in exercising some check on the administration He may also help to forge a link between the Government and the governed.. If he proves himself immune to improper influence of any kind, his very existence may inhibit discriminatory acts and kindred practices on the part of the administration, while creating in the hitherto desperate mind of the ordinary citizen a feeling of confidence that there is some means of redress if the citizen is subject to unfair or unjust treatment by the administration. To the efficient and conscientious administrator, the Ombudsman could be a protector against unfair public criticism; to him he would prove a friend, and to the erring he could be both philosopher and guide. These are attractive possibilities. But there remain a few questions as well will the administration tolerate him ? will they co-operate with him ? will the public place sufficient confidence in him ?[21] And there is a note of utter pessimism, born of unhappy conditions in India, in the last question; who will guard the Guardian Angel ?

---

13. Section 95 (1) & (2).

14 It is not clear why a second copy of the report and recommendations is to be sent to the Governor As the executive head of the State, the Governor is to be informed that no adequate or appropriate action has been taken by the department or authority concerned.

15. Section 95 (3)

15 a. Section 96 (3).

16 Section 96 (1).

17. Section 92 (*e*).

18 Section 97

19 Quoted by P S. Chaudhuri, "Ombudsman—Its Desirability in India", (1967) II *Supreme Court Journal* 77

20 Sir Guy Powles, "The Office of Ombudsman in New Zealand", 7 *Journal of Administration Overseas*, (1968) 287 Sir Guy proceeds to state : "While undoubtedly a member of the genusi Ombudsman and while bearing its Scandinavian name, the New Zealand Ombudsman is not an exotic transplant from Scandinavia, but is a distinct and native species—this is not however to discount the immense value of the Scandinavian (particularly the Danish) experience from which New Zealand has profited (*ibid*) Lokpal and Lokayukta could equally well develop into something othe than an *exotic* transplant

21 The New Zealand Ombudsman reported in March, 1967 that "With the continued cordial co-operation of ministers and the sincere and willing assistance of the departments and organisations subject to jurisdiction, the office continues to run according to a fairly stable pattern" quoted in Sir Guy Powles, *op, cit*, page 292.

EUROPEAN CONFERENCE ON THE INDIVIDUAL AND THE STATE "THE ESSENTIAL LEGAL ELEMENTS TO ENSURE THE PROTECTION OF THE INDIVIDUAL"

Strasbourg, 26-27 October, 1968.

CONCLUSIONS.

Preamble.—Whereas the Universal Declaration of Human Rights recites that it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, and enumerates the human rights and fundamental freedoms which States have undertaken to promote and observe,

And whereas by the European Convention on Human Rights (1950) the Member States resolve to take the first steps for the collective enforcement of certain of the Rights set forth in the Universal Declaration and guarantee the enjoyment of the rights and freedoms set forth in the European Convention,

And whereas by Article 2, paragraph 1 of the International Covenant on Civil and Political Rights (1966) each State party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

And whereas by Article 2, paragraph 2, each State party to the said Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the Covenant,

Recalling that the International Commission of Jurists has, at its Congress of New Delhi (1959), stressed that it is a function of the legislature in a free society under the Rule of Law to endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights and to create and maintain the conditions which will uphold the dignity of man as an individual, which dignity requires the recognition of his fundamental rights,

And recalling that the International Commission of Jurists has, at the Congress of Rio de Janeiro (1962) on 'Executive Action and the Rule of Law', concluded that the Rule of Law depends upon effective Government capable of maintaining order and promoting social and economic development on the one hand and upon adequate safeguards against the abuse of State power on the other,

And recalling that the Assembly for Human Rights held at Montreal in March, 1968 and the United Nations International Conference on Human Rights held at Teheran in April|May, 1968 recognised that many aspects of modern technological evolution presented new dangers to human rights and to human dignity and recommended that a study be undertaken in this field,

And realising that the ever expanding scope of State regulation resulting from increasing economic, social and scientific activity necessitates a more complete and effective system of protection for the individual,

And realising that one of the primary responsibilities of the State towards the individual is to provide adequate and effective mechanisms for the protection and furtherance of his fundamental rights and freedoms;

Now therefore this European Conference of Jurists adopts the following conclusions:

PART I: ESSENTIAL SAFEGUARDS.

1. **Guarantee of Rights.**—Fundamental human rights and freedoms should be guaranteed by law, preferably by a written constitution.

2. **Separation of Powers.**—The principle of separation of the legislative, executive and judicial powers of the State should be respected.

3. **Independence of the Judiciary.**—The independence of the judiciary should be secured. Such independence implies freedom from interference by the executive and legislature and freedom to interpret and apply the laws of the land in accordance with the Rule of Law and the fundamental principles of justice. In order to ensure the independence of judges it is essential that their appointment should be free from political interference or patronage, they should enjoy full security of tenure and should receive adequate remuneration which cannot be altered to their disadvantage during their term of office.

(For more detailed requirements see New Delhi Conclusions on the Judiciary and the Legal Profession under the Rule of Law).

4. **Availability of Remedy.**—Remedies should be provided by law against infringement of the rights of the individual, by State organs, public authorities or individuals.

5. **Speed of Remedy.**—Judicial process should provide for the disposal of cases without undue delay.

Civil and criminal proceedings should be free from unnecessary procedural difficulties and technicalities, which result in undue expense or delay and present other obstacles to the speedy vindication of rights. To obviate delays it is essential that there should be an adequate number of judges and Court officials.

6. **Fair Hearings.**—There should be fairness and objectivity in judicial and quasi-judicial proceedings. This entails not only an objective tribunal, giving each party a fair and equal opportunity to present his case, but also the existence of an adequate system of legal aid.

7. **Judicial Appeal and Review.**—There should be an effective right of appeal from the decisions of a lower Court to at least one higher Court. Administrative acts which may injuriously affect the rights of the individual should be subject to judicial review.

8. **Availability of Evidence.**—The defence in a criminal case, a party to a civil action and a party before an administrative tribunal should have access to all oral and documentary evidence relevant to his case or to the matter under investigation, and effective machinery for compelling the attendance of witnesses and for ensuring the production of documents is essential. In any cause in which the State or a public authority is involved, the State should not be allowed to prevent the production of relevant documents or other evidence unless the Court comes to the conclusion that the security of the State, or the fair administration of justice, would be seriously prejudiced by such production.

9. **Safeguards Against Retroactive Legislation.**—Constitutional or legal safeguards should ensure that the rights of an individual are never adversely affected by retroactive legislation or regulations.

10. Provision Against Double Jeopardy.—Due regard should be had for the principle, "**Nemo bis vexat in eadem cause**".

PART II: ADMINISTRATIVE ACTS.

11. Legal Basis.—Public authorities may only make decisions that are based on existing law, and in furtherance of the object envisaged by the law under which they are made.

12. Prior Consultation.—Where an executive or administrative order ultimately affects the rights or interests of individuals, the public authority concerned should consult the organisations or groups interested in the measure contemplated and give to interested individuals a reasonable opportunity to present their views

13. Motivation for Order.—When an administrative order is made which affects or is likely to affect the rights of the individual, the reasons for the order should be fully stated.

14. Concept of State Responsibility.—The State should be liable for damage arising from the negligence or wrongful acts of its executive and other organs. Under the concept of State responsibility, the State should also be liable in principle for damage resulting from those of its operations which cast upon an individual a burden which is unreasonable in relation to the rest of society, particularly when his ability to earn his livelihood, his family rights or his property rights are adversely affected

15. Minimum Requirements for Quasi-Judicial Acts.—Save in periods of genuine public emergency, where an executive or administrative body has a discretionary power to make orders amounting to an adjudication affecting the rights or interests of an individual, the following requirements should be observed:

(a) There should be adequate notice to the interested parties of the contemplated measures and the reasons therefor.

(b) The interested parties should have an adequate opportunity to prepare their case, including the right of access to all relevant data.

(c) The interested parties should be given the right to be heard, to present evidence and to meet opposing arguments and evidence.

(d) The interested parties should be given the right to be represented by Counsel or other qualified person.

(e) Notice of the decisions reached and of the reasons therefor should be communicated without undue delay to the interested parties.

PART III: EXTRA-JUDICIAL PROTECTION.

16. Administrative Protection.—Consideration should be given to the provision of simple, inexpensive extra-judicial remedies within the administration itself for correcting administrative errors or abuses. Any such extra-judicial remedies should be capable of being granted upon the existing legal and political systems.

17. Ombudsman System.—The institution of "Ombudsman", now operating in Denmark, England, Finland, Guyana, New Zealand, Norway, Sweden and Tanzania, has proved of considerable assistance both in protecting the rights of the individual and in achieving a more efficient administration. An institution of this or a similar nature would be a valuable adjunct to the existing judicial safeguards in any jurisdiction, especially in countries which do not have a system of Administrative Courts

PART IV: CONTROL OVER ASSUMPTION OF EMERGENCY POWERS.

18. Restriction on Assumption of Emergency Powers—The restrictions on the assumption and exercise of emergency powers as set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the United Nations Covenant on Civil and Political Rights, should be the minimum adopted in any State. Steps should be taken by every State to have at least these restrictions embodied in its basic law

19. Judicial Control.—There should be a system of judicial control over the assumption and exercise of emergency powers by the executive with a view to—

(a) determining whether the circumstances have arisen and the conditions have been fulfilled under which the powers may be exercised,

(b) limiting the extent to which such emergency powers may be exercised in derogation of the fundamental rights of the individual, and

(c) giving the Courts a supervisory jurisdiction to ensure that emergency powers are used only for the specific purpose for which they were granted, and that they are not exceeded The Courts should have the power to grant effective remedies in cases of misuse or abuse of emergency powers.

20. Confirmation by Legislature.—Wherever the executive power is legally authorised to declare a state of emergency, the declaration should be compulsorily referred to the legislature for confirmation within the shortest possible time. The legislature should retain control over the duration of emergency periods, which should only be extended from time to time when the Legislature is satisfied that extension is needed

21. Periodic Legislative Review.—An obligation should be imposed upon the executive power to submit its programme and procedures to legislative review from time to time during an emergency

22. Safeguards Against Continuing Arbitrary Confinement.—During periods of public emergency, legislation authorising preventive detention should contain safeguards for the individual against continuing arbitrary confinement by requiring in each case a prompt hearing and decision upon the need and justification for detention. Such decision should always be subject to judicial review.

THE PASSING AWAY OF THE CHIEF MINISTER.

Within less than twenty-three months of his becoming Chief Minister, Mr C N Annadurai has been snatched away by a fell-disease. The anxious all-night vigil kept by thousands of people, during the days of his last illness, the unparalleled surging crowds present during the funeral, the chorus of tributes showered on the deceased from all quarters, high and low and the feeling almost of a personal loss evoked in the minds of the masses by his death, show how deeply he was loved and in what great esteem and affection he was held A man of the masses, a fine Tamil scholar, journalist, actor, social worker, a person on whom the mantle of leadership fell as an automatic choice, he filled his office with distinction and won admiration for his sobriety of outlook and remarkable resilience without at the same time sacrificing any of his principles His uncompromising stand against Hindi fanaticism and imposition of Hindi is well known Mr Annadurai had identified himself with the masses They were always in his thoughts He was essentially human endowed with a charismatic personality He was also a firm believer in the rule of law and abhorred violence of every kind His dealth at this juncture is a great blow to Tamil Nadu. Such was Mr Annadurai When comes another !

We offer our sincere condolences to the members of his bereaved family.

RECENT APPOINTMENTS TO THE HIGH COURT[1]

We offer our respectful felicitations to Mr K Narayanaswami Mudaliar, Mr K. S. Palaniswami Goundar and Mr S Ganesan on their appointment as Judges of the High Court Mr Narayanaswami Mudaliar goes to the Bench after less than two years of service as Advocate-General, and fills a permanent vacancy Mr Palaniswami Goundar and Mr Ganesan come to the High Court from the ranks of District and Sessions Judges, rich in experience of all facets of judicial work All these appointments had been expected for some time and there is no element of surprise about them

We also offer our felicitations to Mr S Rangarajan on his appointment as a Judge of the Delhi High Court Mr Rangarajan was perhaps the senior-most District Judge in the State He possesses a brilliant academic background and a thirst for knowledge and yet more knowledge It was a matter for wonder why his promotion had not come much earlier What is a loss to Madras has been a gain for Delhi

On an occasion like this, it may be permissible to cast a thought or two on the state of litigation in this country Dickens might have lampooned laws' delays and called the law an ass Catchy slogans might be uttered that justice delayed is justice denied The matter however is no longer one for mere carricature or sarcasm Litigation is growing steadily and in more than arithmetical progression Justice Shah of the Supreme Court remarked that the heavy accumulation of arrears of cases before Courts and Tribunals has now reached such a proportion that if the cases before the Court rise at the rate at which they are mounting today, there would be great danger of the judicial administration breaking down in a few years [1] This is a solemn warning The matter admits of tinkering no longer It has to be reviewed seriously and at the highest level Contributory factors tending to litigation explosion are many and various Growth of national income, industrialisation, social legislation, mass consciousness of rights, phenomenal popularity of the writ jurisdiction, multiplicity of law reports, long-winded advocacy, too many appeals in a matter and various other causes might be listed A fall in the calibre of the Judges as compared with Judges of an earlier generation is also sometimes urged as a factor to be considered. It has been said that Judges like Coutts Trotter, C. J. or Kumaraswami Sastri, J , could go through pages of admission cases well before the closing time and to the satisfaction of the legal practitioners Justice Varadachariar could easily get through ten second appeals a day. And so on Whatever may be the root causes the mounting accumulation of arrears is a patent fact It is equally patent that, whatever steps have been taken so far towards the control of arrears of work, they have not gone beyond the fringes of the problem The costliness of litigation has been no deterrent The creation of Special Tribunals to deal with special classes of cases like industrial disputes, tax disputes *etc* , has not appreciably reduced the burden The appointment of Additional Judges is another expedient that is being tried. Its impact however is not appreciable It is high time therefore that radical solutions are found

We can only hope that in the meanwhile our Judges will go about the task, making an all-out effort to tackle the problem

---

1. Speech delivered while inaugurating the Convention of the All India Taxation Advocates.

JUDGES SITTING ON COMMITTEES OF ENQUIRY.

By

GOPAL BEHARI, *Advocate, Allahabad.*

The letter of the eminent jurist and ex-judge, Mr P N Sapru disapproving the appointment of sitting and retired judges on committees of enquiry published in *Northern India Patrika* raises fundamental questions of judicial propriety It is significiant that Lord Denning, Master of the Rolls, who visited Allahabad the other day was associated with the enquiry into the Perfume scandal There is however a strong volume of judicial opinion itself against extra-judicial assignments to judges, and successive judges have refused to sit on committees for obvious reasons The Courts should not be made fishing ponds for glamour jobs Further the enquiry may have political repercussions, or the issues involved therein may be the subject of an action in a Court of law which alone can finally determine the rights and obligations of the parties Thirdly the judicial personnel in such inquiries is without the customary support and legal protection which the judge enjoys in the discharge of his judicial office, According to Chief Justice Stone, " he exposes himself to attack, and indeed invivites it, which because of his peculiar situation inevitably impairs his value as a judge and the appropriate influence of his office " Chief Justice while he refused to lend the services of justice Brandeis on a commission to settle a border dispute with Mexico as being against judicial proprieties, and his succeessor Chief Justice Taft, maintained the strict policy against off-Court assignments with the concurrence of the whole Court

While it is true that the position of polarity with the executive so far as sitting judges are concerned, has to be avoided, there does not seem to be any reason why the ban should also be imposed on retired judges In order, however to maintain the continuity of sturdy independence of the bench, it is very desirable that the choice of the personnel should not be left to the executive The choice could very well be made by the Chief Justice of the Court to which the retired judge formerly belonged

What is unfortunately forgotton is that the superiority does not necessarily lie in the personal qualifications of the judge What gives the judicial finding its main-sanctity is the set-up and the legal atmosphere of the Court, the full and open hearing, a vigilant bar, the citation of rulings or authorities, followed by the reasoned judgment of an impartial judge based on a documented record liable to scrutiny by a higher Court of appeal If you take away these trappings both visible and invisible, you may have some sort of verdict from the commission of enquiry, but it can hardly be called a judicial determination having the finality of a judgment.

SHRI P. S. SIVASWAMI AIYAR*

By

C. R PATTABHI RAMAN.

The latter half of the 19th century saw the efflorescence of legal talent in South India Law was one of the few avenues open to Indians of those days where they could achieve prominence It was a period when the great Sir T. Muthuswami Aiyar adorned the Bench of the Madras High Court with outstanding merit.

Sri Sivaswami Aiyar was born in Pazhamaneri in Tanjore District in 1864 in an orthodox Brahmin family His father Sri Sundaram Aiyar was one of the earliest in his District to learn English and become a teacher in the S P. G. Mission School at Tanjore. Differing with management, he resigned from the school and became a Pleader He did well in law and this enabled his son to get a good education and live in comfort Sivaswami Aiyar was called Doraiswami in his early years, out of respect for the elder whose name he bore. His father was a strict disciplinarian Sri Sivaswami had innate respect for Hindu culture and revered his parents. We see him in the days of his law practice in Madras rushing to his father's bedside in Tanjore and nursing him till he was restored to normal health staying with him for about three months.

As a young lawyer, he and his brilliant contemporary V. Krishnaswami Aiyar, who was his classmate in the Presidency and Law Colleges, were apprenticed to Sri Balaji Rao It was his good fortune that in this period he got the acquaintance of Diwan Bahadur Srinivasa Raghava Iyengar who had settled down in Madras after distinguished service as Dewan of Baroda Sri Sivaswami was a good student in Law and strove hard in the profession reaching the top quite early in his career Though law took much of his time, he did not become a pure technician but continued his association with a wide variety of studies in Sanskrit and English classical literature, Economics and Politics. He was a brilliant student and secured a First Class in the F A Examination of those days in 1879 and later on in the B A from the Presidency College securing medals in Sanskrit and English and the Gordon Prize He took his B L Degree in 1884 and we find him as a young lawyer giving evidence before the Royal Commission on Public Services Like many of the leading young lawyers of his day, he was also a Lecturer in the Law College till 1899, and in addition joined as Editor of the 'Madras Law Journal' which position he held till his Advocate-Generalship in 1907 In 1904 he was elected to the Madras Legislative Council from the Senate of the Madras University—the first Indian to be so elected. By this time, his interest in Education had deepened He undertook the raising of the school at Tirukattupalli near his village into High School He later on endowed this Institution with a generous donation and the grateful people of the locality have named it after him His views on proper education of the children are as valid today as they were when he spoke about it many many years ago. To quote him :—

"The trend and ideals of education are bound to be affected by the social and economic changes which will follow the conclusion of the Great War The reconstruction of the social and economic order in the post-war world has been engaging the attention of thinkers in England and elsewhere India cannot

---

*Broadcast on 6th February, 1969 at 9-15 P M Published by and courtesy of the All India Radio, Madas.

escape the influence of these changes in other civilised countries and we shall have to adapt ourselves to the altered conditions of life However great may be the changes initiated in the new scheme of things, there can be no doubt that the moral aim of education will continue to hold good The creation of a love of knowledge and learning and of efficiency in one's work and inculcation of a desire for the service of the country and the spirit of citizenship must always be our aim The attainment of these objects depends to a great extent upon the general atmosphere of the school and the spirit by which the teaching staff is animated."

With the same zest, he took interest in women's education and the National Girls School at Mylapore became his beneficiary later on. He not only gave all his large properties to the schools but actually took interest in the detailed working and the welfare of the teachers and pupils throughout his life. His philanthrophy and detachment were so unique that he vacated his own palatial house "Sudharma" in order that it may be sold and the school may benefit by the sale proceeds He went to live in a small building opposite to the very house which was one of the show places in Madras in those days. He would not listen to his friends and admirers who asked him to live in his own house at least till the end of his life His answer was that by continuing to love in his own house which he had donated to the school, he was robbing the school of its due

As a lawyer, he strove in an exemplary manner and achieved success competing with giants in the Bar like V Krishnaswami Aiyar, P. R Sundaram Iyer, C. Sankaran Nair, Eardley Norton and others When paying encomium to Sir S Subramania Aiyar, retiring from Judgeship of the Madras High Court, Sri Sivaswami Aiyar said that superior advocacy implied not only putting forward the case of one's client but also to help the Court to administer sound and proper justice Sri S. Varadachariar, one of his disciples and juniors who later on became Judge of the Federal Court of India, says this about his leader.

"My leader Sir P S Sivaswami Aiyar had to argue before Sir S. Subramania Iyer and an English Judge He appeared for the Respondent and was aware of a Privy Council case which, if quoted by the other side, would turn the case against him. His opponent had not cited the case My leader could not sleep the whole night because he was torn by a sentiment of conflict between his duty to his clients and duty as an advocate He consulted friends and ultimately on the next morning pointed out the case to the Bench and this settled the case"

My father Sri C P Ramaswami Aiyar, who followed him as an Advocate-General in 1921 says "Having followed him as Advocate-General later on I can testify and have publicly stated about his independence of judgment, impartiality of his opinions and his dignified though quiet assertion of his views—my view being based on a study of the opinions tendered by him to the Government of those days".

He was like Mr Rozario, who followed him one, of the most respected lawyers of his time, not only on account of his hard work and precise and exact expressions but also on account of his sterling character Two decades after his enrolment, he was appointed Advocate-General of Madras in 1907. It is sad to recollect that some of his Barrister colleagues protested as a body to the Government of India and the Secretary of State against the appointment of a mere Vakil as Advocate-General This was a repeat performance by them because after a similar trial when the great Bhashyam Iyengar was appointed as Advocate-General they had failed On this occasion the Chamber of Commerce also joined them and submitted a Memorial The Government of the day were prudent enough to ignore these protests As Advocate-General, Sri Sivaswami Aiyar distinguished himself as leader and Doyen of the Bar.

After 5 years of his leadership at the Bar, he was appointed Member of the Executive Council of Madras It is interesting to note that both before and after him leaders of the Bar whose names have become immortal retired from the profession after a short spell of office as Advocate-General and did not return to the Bar. They were impelled by a noble urge to do public service and help the people in every manner possible What is equally important is that people like him left behind them trained advocates as a second line in the profession who could take up great responsibilities Apart from Sri S Varadachariar who became a Judge of the Federal Court, his other disciple T R Venkatarama Sastri became Advocate-General and later on resigned his Executive Council Membership after a few days of his office in protest. To mention only these two names is enough to reflect the moral and social stature of the great master

His Executive Councillorship was equally distinguished. He was the most respecteed Indian of the times. I remember the stories told in Ootacamund when the great Sivaswami Aiyar played golf. He was slow moving and deliberate and held up a number of young golfers including Europeans belonging to the Civil Service and of business houses on the golf course, but none dared to byepass him They waited for the great man to finish his game.

After relinquishing his Executive Councillorship he was Vice-Chancellor of the Madras University from 1916 to 1918 and thereafter becamee Vice-Chancellor of Banaras University and was there till 1919

Writing on his Executive Councillorship Sri C P Ramaswami Aiyar says "I can from my personal experience contradict those who regarded him as deficient in courage Although very often he was in a minority of one he never failed to express with instructive insistence his own view point But what was characteristic of Sri Sivaswami Aiyar was that he never let people know what he had done The vow of official secrecy which he took, was uniformly observed by him although this vow was too often facilely broken by those who sought temporary popularity as independent and liberal-minded statesmen Sivaswami Aiyar's gift of silence was as marked and valuable as his gift of measured speech During the time when he was a member in a number of Councils, there was not one occasion on which he compromised for the sake of compromise and there are many occasions on which he stood alone"

Sri Sivaswami Aiyar fought against the arrest and internment of Dr. Besant by the Pentland Government and even stated that he would have to resign Dr Besant came to know about this later on and acknowledged her gratitude to him in the New India Newspaper edited by her It was during this period that he frequently sought to impress on the Government in England the need for Reforms for India. He wrote with great force and ability to the Viceroy Lord Chelmsford and Mr Montague, Secretary of State for India He had already shown his deep knowledge of service conditions when he gave evidence before the Royal Commission on Public Services in 1887.

As a Legislator, Sri Sivaswami Aiyar's contribution is unique Sri B. Shiva Rao, referring to his work in the Central Assembly says —

"I recall an incident which took place in the Budget debates in 1922 when Sri Sivaswami Aiyar objected to the Government's Expenditure proposals both on civil administration and on Defence and after a searching analysis came to the conclusion that there was large scale extravagance Sir Malcolm Hailey, the Finance Member before replying to the debate walked across the floor to Sri Sivaswami Aiyar's seat and asked for a copy of his speech The Government had of course no suitable reply to give beyond a promise to be implemented later and that all the points would be closely examined by a Retrenchment Committee. On an another occasion, he startled the Government with a speech on a note for a

progressive policy of programme in the North West Frontier Province . on the basis of such an array of irresistable facts that no official without the personal experience of the records could seriously meet his points".

His contribution on Army and Defence matters were unique Speaking on the occasion of Sathabishekam of Sri Sivaswami Aiyar, Sri C. P. Ramaswami Aiyar says.

"Sri Sivaswami Aiyar was a man of peace I do not think—at all events—I am too young to know, that he was very atheletic in composition. He could not be called a soldier by nature but he was a man of indomitable courage and his wide patriotism was such that he determined to make himself a specialist on military questions Sir Claude Auchinleck, the Commander-in-chief of India, sent his tribute to be read at the meeting It was in the year 1917 that Sivaswami Aiyar originated the Indian Defence Force. If there was one man who more than any other ensured that the people of South India could play a part in War as well as peace it was Sri P S. Sivaswami Aiyar. He successfully fought the unwarranted distinction between martial and non-martial races perpetrated by the British Government

Apart from his work in the armed forces, he helped in the Indianisation of the higher Medical Services in the army and was responsible for increasing the Indian element in the I M S.

As a politician he was a liberal minded statesman who was very particular that only constitutional methods should be employed for the political progress of India. Strangely enough for all the appeaiance of being a moderate, he was not slow to draw conclusions which were radical

He contributed much and was equally outstanding in new spheres. For example he took up the family limitation and birth control half a century ago with a zest which did not diminish even when people made fun of him. He had no children himself and they thought it odd that he should advocate family planning in India. He toured much and visited Ceylon quite often, and Burma, Europe and America

That he was a man of courage was proved when while he was travelling an English Captain came with his wife and children and moved into his compartment, and finding his presence objectionable insulted him by calling him a brute and a blackman and wanted to know whether he kenw any English but Sri Sivaswami Aiyar in a dignified manner spoke in chaste English to the upstart and refused to budge from his compartment

As an author he has made original contributions His book cn 'Indian Constitutional Problems', 1928 was an invaluable work about which Prof. A B Keith stated that he read it with much profit and satisfaction His other book on the 'Evolution of Hindu Moarl Ideals' based on his Kamala Lectures delivered at Calcutta is still a great contribution on Hindu moral ideas and practice through the centuries.

As regards his attitude to religion, he was a great student of the Bhagavatham and read the Bhagavat Geetha in the light of Sri Sankara's exposition.

Writing on his personal traits, Rt Hon'ble V S Srinivasa Sastri says —

"Sivaswami Aiyar is every inch a scholar He hails from those spacious days when no man had a claim to culture unless he knew something of everything and everyhting of something This description would be as true of him as of any person of my acquaintance His distress was unaffected when he could make nothing of that book on Cosmic Rays which Venkatarama Sastri mentions. He is a belletrist, as distinguished as enthusiastic".

"The essential integrity of Sivaswami Aiyar's mind is seen in its continued receptivity New knowledge and new experience can still shift him from his moorings His political views are not cast in an iron mould. If a chart could be made showing their trend fifty years ago and their trend at the present day, the progress would be little short of a revolution. Time in its onward march has dragged the liberals along with others 'The extremist is only the moderate in a hurry' is meant as a sarcasm, but it has a core of truth. We are patriots all and serve the common mother What profound kinship it signifies! We forget it in the wrangles of the moment".

As a student I saw Sri Sivaswami Aiyar from a distance. My father had great regard for him and met him frequently Whenever Sri P S Sivaswami Aiyar came to our house, it was a great event. He was slow and deliberate and would converse with my father for a long time. When he got up to go, my father used to see him to his carriage himself and close the door of his car. He was respectful to everyone however young he may be to an embrassing degree He addressed every one in the plural and even including me—a mere stripling in those days.

It is well to remember that it is on the edifices laid down by great patriots like Sri Sivaswami Aiyar that Free India was born. It is important for every student to read the life of great Indians like Sri Sivaswami Aiyar. We can forget these great men only at our peril Their lives should serve us a stimulus to strive for the progress of our land.

References :—

1 "Biographical Vistas" by C P. Ramaswami Aiyar, Asia Publishing House

2 "A great Liberal" Speeches and writings of Sir P S. Sivaswami Aiyar, by Prof K A Nilakanta Sastri, Allied Publishers P Ltd

3 "The Other Harmony" by V S Srinivasa Sastri S. Viswathan.

K. ANANTHA NARAYANAN *V* STATE OF MADRAS
(1968) 2 M L J 443 : (1968) M L.J. (CRL) 630.
A CRITIQUE.

By

M. L. KAUL, LAW COMMISSION, NEW DELHI

The above decision of a single Judge of the Madras High Court has focussed attention once again on the applicability of Article 20 (2) of the Constitution to proceedings initiated by more than one Government Department against a Government servant charged with an offence. The facts of the case may briefly be examined.

The petitioner, an employee of the Madras Government, was a candidate for the Madras Public Service Commission Examination His application was rejected on the ground that he had unauthorisedly altered his date of birth in the S S. L C book He was also directed to show cause as to why he should not be debarred from appearing for the future selections and examinations of the Commission. In the meantime the petitioner's S S L. C book had been also sent by the Commission to the Commissioner for Government Examinations, Madras The Commissioner also asked the petitioner to submit an explanation on a similar charge The petitioner submitted his explanation to the Secretary, Public Service Commission, and also to the Commissioner for Government Examinations Not satisfied with his explanation the Director of Public Instruction suspended the certificate for one year. The Madras Public Service Commission debarred the petitioner from appearing for future selections and examinations to be conducted by the Commission.

In the meantime, the Assistant Collector, Pudukottai, also framed a charge that the petitioner had unauthorisedly altered the date of his birth in his S S L C book. Petitioner was asked to show cause why he should not be removed from service. However, the Assistant Collector subsequently ordered that further action was not necessary, since the petitioner had been punished by the Director of Public Instruction for the offence, and the rule[1], prohibited punishment for the same offence twice. Subsequently, the Public Service Commission sent its list of black-listed persons to the Government, where upon the Collector once again directed the Assistant Collector to take disciplinary action against the petitioner, who was among the black-listed persons. Disciplinary proceedings were commenced against him, and he submitted his explanation The Assistant Collector rejected it, and passed orders "removing" the petitioner from service The petitioner moved the High Court and sought a direction that the order of removal, being a second punishment for the same offence, was invalid

Applicability of Article 20 (2) of the Constitution.

The point for consideration of the High Court was whether the order of the Assistant Collector, removing the petitioner from service, was void as opposed to Article 20 (2) of the Constitution The High Court held that, in suspending the certificate of the petitioner for one year, the Director of Public Instruction had, as a department of the State Government competent to proceed against the petitioner 'punished' him It was not, therefore, open to the Government to authorise another department of the Government to revive the proceedings once again, by framing

---

1 No specific rule was, however referred to.

a different charge for the same offence and punish the petitioner severely The High Court, therefore, held that the second proceedings were void as violating Article 20 (2) of the Constitution.

The judgment is thus based only on Article 20 (2) The question, therefore, arises as to whether Article 20 (2) of the Constitution is applicable to the present case. Article 20 (2) runs as follows :

" No persons shall be prosecuted and punished for the same offence more than once."

The conditions for the application of this clause are .

(*a*) There must have been a previous proceeding before a Court of Law or judicial tribunal.

(*b*) The person must have been prosecuted in the previous proceeding

(*c*) He must have been 'punished' in the previous proceeding.

(*d*) The 'offence' which is the subject-matter of the second proceeding must be the same as that for which he 'was prosecuted and punished' in the first proceeding.

(*e*) The offence must be an " offence " as defined in section 3 (38) of the General Clauses Act, that is, an act or omission made punishable by any law for the time being in force.

(*f*) The second proceeding must be a proceeding where he is, for the second time, sought to be 'prosecuted and punished' for the same offence [2]

Thus two of the essential ingredients of Article 20 (2) are as indicated in (*a*) and (*b*) above—that the person should have been " prosecuted" for the offence, (in the first proceeding), and that must have been a proceeding before a Court of law or judicial tribunal 'Prosecution' according to the *Wharton's Law Laxicon* means a proceeding either by way of indictment or information, in the Criminal Courts, in order to put an offender upon his trial[3]. The Supreme Court, in *Maqbool Hussain's case*[4], observed that " Prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure." Reference may be also made to the corresponding provision, namely, Article 14 of the Draft Constitution which was discussed in the Constitutent Assembly. Clause (2) of the Draft Article contained only the word punished and not the words prosecuted and punished Shri T T Krishnamachari had, therefore, suggested an amendment that Clause (2) should include 'prosecuted and punished'. He justified the amendment on the ground that the clause as in the original draft might possibly result in the position that a Government official who had been dealt with departmentally and punished could not be prosecuted and punished by a Court of law if he had committed a criminal offence ; *per contra* if a Government official had been prosecuted and sentenced to imprisonment or fined by a Court of law, it might preclude the Government from taking disciplinary action against him[5]. The amendment was accepted

2 Basu (D.D) *Constitution of India*, 5th Edn , Vol 2, pp 13-14.

3 *Wharton's Law Lexicon* 4th Edn. P 820

4 (1953) S C J 456 · (1953) S C R. 730 (1953) 2 M L J. 113 · A I R 1953 S.C. 325.

5. C A. Deb. Vol VII, pp 789-90 and 795 see *The Framing of India's Constitution*: *A Study*, edited by B. Siva Rao, 1968, p. 230.

The emphasis on a criminal prosecution has been very clearly brought out by Seervai :

" The presence in Article 20 (1) of the words ' convicted ' ' commission of the act charged ' as an offence, ' be subject to penalty', ' commission of the offence ' and in Article 20 (2) of the words ' prosecuted and punished ' and in Article 20 (3) of the words ' accused of any offence ' indicated that proceedings contemplated by Article 20 (2) were of the nature of criminal proceeding before a Court of law or a judicial tribunal . . [6]"

The exact nature of a departmental enquiry also came up for consideration of the Supreme Court in another case, *Venkataraman* v *Union of India*[7] The Supreme Court, therein, held that an enquiry under the Public Servant (Inquiries) Act, 1850, was a fact-finding enquiry and the fact that the Commissioner appointed under the Act had some of the trappings of a judicial tribunal, did not convert a fact-finding by such Commissioner into a judicial tribunal It was, held, that the dismissal by the President of the petitioner, following on a report by the Commissioner, did not prevent a criminal prosecution being launched a ainst him in respect of the acts, for some of which he had been dismissed. *Maqbool Hussain's case*[8], was referred to in the judgment.

Conclusion.

It is, thus, well-settled that a departmental enquiry is not a 'prosecution' for the purpose of Article 20 (2) In *Venkataraman's case*[7], even though the second proceeding which was questioned as violative of Article 20 (2) was to be taken in a regular Court of law, it was held that Article 20 (2) would not apply because of the non-judicial character of the first proceedings which was only departmental The rule as to the non-applicability of Article 20 (2) should, a *fortiori*, apply to a case, like the present, where even the second proceedings is departmental.

It is respectfully submitted, therefore, that *Anantha Narayanan's case*[9] has been wrongly decided on the ground that the second punishment violates the prohibition contained in Article 20 (2) of the Constitution It is certainly in the interest of the proper administration of justice that a person is not proceeded against in two departmental actions, for the same offence, resulting in two different punishments. But this cannot be done by resort to constitutional provisions which are not applicable to the facts of the case

---

6 *Seervai* (H.M), *Constitutionl Law of India*, 1968, p 420

7 (1954) S C J 461 (1954) S C R 1150 (1954) 1 M L J. 702 A I R. 1954 S.C. 375.

8. (1953) S C J 456. (1953) 2 M L J 113. (1953) S.C R. 730.

9. (1968) 2 M.L J 443 (1968) M L.J. (Crl) 630.

EQUAL OPPORTUNITY IN PUBLIC EMPLOYMENT.

By

JOSEPH MINATTUR, PH D , LL.D , D C.L , *Barrister-at-Law.*

'Instructions to candidates for appointment by selection' issued by the Union Public Service Commission contains the following :

> Candidates must submit with each application a crossed Postal Order for Rs 8.00 (Rs 2 00 for Scheduled Castes/Tribes candidates) Applications not accompanied by full prescribed fee will not be considered

The amount prescribed as application fee may not be high when one considers the salary attached to the job for which application is invited But there are a few other factors worth taking into account. Let us consider the case of a young man from a poor family To see him through the University, his parents may have made considerable sacrifices, financial and otherwise, in the hope that when once he passed his examinations, he would be able to earn enough money to support himself and his family which in the Indian context would usually include the parents Now he is unemployed He seeks employment and makes applications to the Union Public Service Commission, to the State Public Service Commissions, to various departments of Government, to Universities and to many other institutions In almost all cases he is required to pay an application fee He can ill afford to pay it He may be able to pay a fee in one or two instances, but the chances of his securing a job if he makes only a couple of applications are very slim So he has to make a number of applications If he makes about, say, twenty applications, he should be prepared to spend Rs 100 or more as application fees Further in most cases when he is called for interview he is informed that no travel or other expenses incurred in connection with the interview will be paid to him [1] If a candidate applies for twenty jobs and attends, say, for five interviews, he may have to spend about Rs 450 or more, and this money has to come from the nearly empty pockets of his parents This situation may inhibit many poor candidates from applying for jobs in the Public Service

It is arguable that this requirement regarding an application fee is an infringement of an Indian citizen's fundamental right to equality of opportunity in public employment Article 16 (1) of the Constitution provides :

> 'There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State'

The prohibition of discrimination in relation to public employment contemplated in clause (2) of the Article is on grounds of religion, race, caste, sex, descent, place of birth, residence or any of them Discrimination on the basis of wealth is not prohibited! That the requirement of an application fee will prove an effective discrimination in the case of a poor candidate, whether it is so labelled or not, is clear The 'fact that candidates belonging to the Scheduled Castes/Tribes are required to pay only' a lower amount of fee indicates that the Commission recognise that there is some hardship involved in requiring payment of a fee as a condition precedent to considering applications If it is a hardship which undoubtedly it is, the basis on which concessions are granted should be inadequate financial resources rather than anything else There may be a number of candidates who do not belong to these two

1 The Union Public Service Commission offer to pay second class return railway or steamer fare plus a road mileage of 8P a kilometre for any road/bus journey which may have to be made to the nearest railway or steamer station.

categories, but who may be poorer than the average member of a Scheduled Caste/Tribe What Article 46 lays down as a basic principle is the promotion of the educational and economic interests not only of the Scheduled Tribes/Castes, but also of the *weaker sections of the people* and their protection from social injustice and all forms of exploitation Aristotle has pointed out that injustice arises not only when equals are treated unequally, but also when unequals are treated equally. If no requirement is made in regard to an application fee, candidates belonging to the Scheduled Castes/Tribes will have no reason to complain, while other weaker sections of the people will be benefited.

The general provision regarding equality of opportunity in public employment enshrined in Article 16 (1) may be read with the words of the Preamble of the Constitution which purports to secure to all Indian citizens

> Justicé, social, economic and political and equality of status and opportunity

and the provision in Article 38 which directs that

> The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life

This, as is well known, is one of the principles fundamental in the governance of the country.

The fact that a breach of a directive principle is not made justiciable in the Constitution does not make the principle any the less valid in the administration of the State There is no provision for judicial review of Parliamentary legislation in some of the states of Western Europe This does not mean that the legislatures of these countries pass laws inconsistent with the provisions of the Constitution When it is brought to the notice of the legislature that a particular provision in a bill before it contravenes a constitutional provision, the legislature either amends the provision with a view to making it consistent with the constitution or declines to proceed with the enactment of the provision This is not because the legislature is afraid that the judiciary would declare the provision unconstitutional—the judiciary has no power to do it—, but because the legislature considers it improper to pass a piece of legislation which contravenes constitutional provisions An attitude similar to this may be adopted by the State in India in regard to directive principles The Constitution makes it clear that " it shall be the *duty* of the State to apply these principles in making laws."[2] It is refreshing to note that in interpreting laws these principles are often sought to be applied with the result that the rule emanating from the interpretation conforms to these principles, but what is sometimes overlooked is the fact that it is the duty of the State, which includes the judiciary, to apply these principles when laying down a rule of law.

If an argument in favour of imposing an application fee be founded on the necessity to meet expenses connected with recruitment, it is important to note that equality of opportunity in public employment guaranteed to the citizen as a basic right is not hedged in by any such qualification as found in Article 41 (The State shall, within the limits of its economic capacity and development, make effective provision) It is admitted that the Government needs revenue and the collection of a fee from applicants for appointment to public service is a source of revenue. But if the imposition and collection of such a fee is made in infringement of a fundamental right of the citizen, it is undoubtedly unjustified.

---

2. Article 37.

The observations made by Gajendragadkar, J, in *Prem Chand Garg* v *Excise Commissioner, U P.*[3], may be of interest in this connection :

An order calling upon the petitioner to furnish security would retard the assertion or vindication of his fundamental right under Article 32 since it would impose a financial obligation on the petitioner and if he is not able to comply with it his petition would fail The order would in some cases effectively bar and in all cases amount to a hindrance in the further progress of the petition and cannot be said to aid a fair hearing of the petition like the order prescribing the manner in which the paper books have to be prepared, or other steps in connection with the petition have to be taken It may be that the order is intended to protect the interest of the respondent and in that sense, may be treated as fair , but the fairness of the order or of the object intended to be achieved by it will not disguise the fact that its effect is not to aid the petition but to retard it to some extent and in considering the constitutionality of the order or of the rule which permits the order to be made, the fact that the object intended to be achieved is good, just or unexceptionable would be immaterial [4]

Though called 'Instructions' many of the instructions issued to the candidates by the Public Service Commission have the character of a rule and the force of law A breach of the instruction in regard to the payment of the application fee will be visited by the refusal of the Commission to consider the candidate's application In his dissenting opinion in *Punnen Thomas* v *State of Kerala*[5], Mathew, J, said :

It is said that Exhibit P-1 is not an order, but only a communication to the department concerned If the memorandum embodies a decision by Government and was intended to be acted upon by the department concerned, it would be highly technical to found a distinction upon the characterisation of that decision as a memorandum and deny the petitioner the relief which he would have got, had the Government labelled the decision as an order and communicated to him. I think the adverse civil consequences to the petitioner is the same whether the Government called it tweedledee instead of tweedledum [6].

The imposition of a fee for application for employment in public service appears to be unknown in most states of the world, democratic or otherwise It is not because these states do not require revenue, but they consider it proper to find other means to add to their revenues

It is not unlikely that the Government fails to recruit in its services qualified and efficient persons on account of this requirement about an application fee coupled with its unwillingness to contribute towards the travel and other expenses of the

3 A I R. 1963 S C 996 (1963) 1 S C R (Supp) 885

4 *Ibid* at p 1101

5. (1968) K. L T 800

6. *Ibid* at p 814, Pandey, J's remarks in *Ramachandra* v. *State of M P*, A I R 1961 M P 247 that if 'Medical Colleges in M P Rules for admission, 1960' had been statutory rules, we would not have hesitated to strike down such of those rules as offend against the provisions of Article 14 or quash any discriminatory action taken in pursuance or even in disregard, of those rules in the face of his finding that the facts showed that " the like were not treated alike and the petitioner was denied equality in equal circumstances" would indicate that his judgment in the case which is State action is violative of the provisions of Article 14 It is clearly laid down that " the primary function of the judiciary is to do justice between the parties who bring their causes before it" (*See* Gajendragadkar, J's observations in *Mirajkar* v *State of Maharashtra*, (1966) 3 S C R 744 A I R 1967 S C 1) The inaction of the Court on the ground that as the " rules are merely executive instructions. they do not attract the principle of equality before the law" denied the petitioner his fundamental

candidates called for interview. Further, quite a number of candidates who are efficient and available for work are probably denied an opportunity to earn an adequate means of livelihood (Article 39) and incidentally, to serve their country the way they might like to do.

That the requirement of an application fee would, in effect, discriminate against the poor in regard to their opportunity for public employment is indisputable , that a discrimination between the poor on the one hand and the well-to-do and the rich on the other is not prohibited under clause (2) of Article 16 is also clear ; but the absence of a specific prohibition does not justify such discrimination when equality of opportunity is guaranteed and when it is considered the duty of the state to implement a social and economic policy which probably envisages a socialistic pattern of society.

There are a few intriguing queries in the application form issued by the Union Public Service Commission Three of them are the following

7. Name of the State to which you belong.

10 State your religion.

17 Post held and scale of pay ; last pay drawn.

It is difficult to understand the relevance of any of these entries As no citizen shall be discriminated against in respect of any employment under the State on grounds of place of birth or residence or religion, there is no good reason why pieces of information relating to religion or place of birth or residence should be collected The query as to which State the candidate belongs to does not appear to be calculated to elicit an answer in relation to the candidate's place of residence which may be relevant in certain cases contemplated in clause (3) of Article 16. It is not improbable that a candidate may have resided in State A for a number of years while belonging to State B A member of the Public Service Commission is given to common human frailities as any one else and the mention of the candidate's religion or region may induce in him an unconscious bias for or prejudice against a candidate " Lead us not into temptation " is as good a prayer for the member of the Public Service Commission as for most other mortals

Information regarding the present salary of a candidate is considered relevant to decide whether the initial salary in the scale or any higher salary is to be paid to the successful candidate But it is often taken into account to decide whether a person is suitable for the job To illustrate . if a well-qualified person who applies for a job carrying a salary of Rs 1,000 is not selected on the ground that his present salary is only Rs 500, the basis for this appears to be the assumption that a man who receives only Rs 500 in December, 1968 is to be deemed unqualified to receive Rs 1,000 in January of the next year, however good he may be found to be in other respects foi appointment This assumption seems to be based entirely on snobbery.

If India contemplates ushering in "justice, social, economic and political," sometime before the end of the century, it is time she started scrapping inequitable procedure in relation to recruitment to public service

---

right guaranteed to him under Article 14 Whichever way one looks at it, whether one considers it action by the State in that the Court delivered a judgment dismissing the petition or inaction by the State because the Court failed to remedy the injustice done to the petitioner by the executive branch of the Government, the violation of the principle of equality before the law by the State through its judicial arm appears clear.

INAM—WHETHER LAND OR REVENUE

By

C. V. SANKARANARAYANAN, B SC , B L , *Advocate, Pollachi, Coimbatore District*

State is a creation of the subjects. State's ownership is the collective ownership of the subjects. The individual ownership of the subjects arises from first occupation or acquisition from first occupants Ownership endures by continued possession Possession is **prima facie** evidence of title of ownership. Incidents of ownership of a thing are the powers of use and disposal of the thing as allowed by law. Possession obtained in good faith and for value confers good title. Long adverse possession confers title even to property which belonged to another Transfer of possession is one of the modes of transferring ownership.

In ancient India, title to land arose from occupancy and to occupancy attached a liability to the State demand upon occupied land The State recognised and respected the ryot's exclusive right to the hereditary possession and usufruct of the soil, so long as he rendered a certain portion of the produce of the land, in kind or money, as public revenue The occupancy right was indeterminable, so long as the stipulated rent was paid and until after default, by the process provided by the law, the ryot was evicted It was always alienable and inheritable Occupation was never disturbed by the State except on proper compensation, and by others except where they could prove a superior title to that of the occupant. But the latter contingency never arose, for land was plenty, not in demand, the demand was for cultivators. And public revenue depended upon the extent of cultivation on occupied land The occupancy ryots earned their living from the land by husbandry. The value of their right in land varied with the weight of public dues, as the invariable condition on which land was held was the payment of the State dues.

The Government, ancient or modern, has no property (proprietary right) in occupied soil, neither claimed it, nor asserted it. The "soil of the land" or the 'land' to put it shortly is the private property of the occupancy ryot The right of the Government in land is only to a charge on the land and a right to forfeit, by due course of law, the title of the person, who does not pay the charge The charge, otherwise termed the dues of the state as universally termed, represents the payments always made to the State from the produce of the land, paid in kind or in money, or rendered in service, whether the payment is made to Rajhas, jagirdars, zamindars, poligars, mootadars. shrotriemdars or to Government Officers, such as the Tahsildars, Amildars, Ameens, or Thanadhars

The Britisher on acquisition of the territory found the peasant-proprietors in occupation with the right to occupy land on payment of the revenue due to the State or its representatives or assignees The State assumed them to be the absolute proprietors of occupied land, as they had by well established and recognised custom the right to occupy the land permanently on payment of the customary dues to the State and treated them accordingly

At that time, revenue from land, which was for long the sole, continued to be the main source, of public revenue It depended on the extent of cultivation on occupied land by individual cultivators But the method of collection differed, in different tracts The collection of revenue depending on the extent of cultivation on occupied land and being very cumbersome and requiring annual settlements,

resort was had to permanent settlement of the revenue with erstwhile rent collectors over specified tracts, who were authorised to collect the same and pay to the State a fixed amount, an unalterable peishcush, a moiety of the average annual public demand on occupied land from the ryots. This is called the Zamindari or permanent settlement which has already been abolished. The Zamindars had no right to oust the occupancy ryots except after default, by the due process of law They were however given proprietary right over unoccupied land within their jurisdiction

Not all lands in the occupation of the ryots were revenue paying. Some of them were found to be rent free. By "Rent free" is not meant not assessed to public revenue They are really assessed lands, and the revenue thereon is made payable to persons or institutions in lieu of ready money payments payable to them by the State This system of saddling the payment of the public demands on particular localities was a general practise of Eastern Finance Commutation of ready money payments into payments from land avoided the trouble of collection from occupancy ryots and also the unpredictability of the required collection during adverse and unproductive seasons Immediately after the British acquisition of the country enquiry into the validity of the grants of exemption from public revenue was instituted under the authority of Regulation XXXI of 1802 to effect retrenchment of such exemptions, or to put it correctly into the validity of the assignments of Revenue was instituted It was not an enquiry into the right of occupancy but an enquiry into the right to be exempted from payment of **revenue direct to the State** in respect of occupied land As far as the State is concerned it is an exemption from payment of revenue to it, to the occupancy ryot it is a payment of the public dues to the grantee, and to the grantee it is a payment from land in lieu of cash payment due from the State. These assignments of revenue or payments from land were called inams whether the payment be to individuals for services past oor present, **etc.**, or to institutions for their support and or to individuals for services therein Inams to religious institutions for services therein or for their support are called Devadayam or religious inams and those for the support of other institutions are called (charitable) Dharmadayam inams It is only these two classes of inams which remain unenfranchised as their objects permanent Other inams, personal and service inams have all been enfranchised.

Enfranchised inams are those personal inams in which the reversionary rights of Government are surrendered to the inamdars, in consideration of an equivalent annual quit rent, or those service inams which have been freed from the conditions of service

The effect of enfranchisement is to place the inam in the same position as other descriptions of landed property in regard to their future succession and transmission The land from which the inam is derived was already transferable and heritable. 'Enfranchise' means 'free'.

From the discussion on "rent free" lands, otherwise called "inam" lands, it will be clear that the inam consists of the right to the melwaram, or its commuted value in money, **i.e.**, the assessment only and that it was this right that was assigned to the inamdar The Inam Commissioner defined inam to be the right to Government revenue on the land specified in the title deed The estimated value of the inam is the assessment on the land from which the inam is derived or drawn The inam right is quite distinct from and independent of the proprietary right in the soil, though both may be vested in the same individual and the one right cannot even be said to be included in the other The reversionary right of the State in inam is only the right to full assessment and not the land itself The right to a certain portion of the pro-

duce from land cannot be construed as a right to the property, to the land itself, as such a principle will lead to anomalous results.

The main object of Regulation XXXI of 1802 and later of the Inam Commissioner was to retrench unauthorised, needless and lapsed exemptions from public revenue, as land revenue was, long the sole and till of late the main source of public revenue The enquiry did not concern with or extend to the right of the occupancy ryot but was restricted in its scope to test the right of the inamdar, be he the ryot himself or any other person, in the case of the former to appropriate and in the case of the latter to collest, the public revenue on occupied land The occupancy ryot was not consulted when demands on the State (payment due by the State) were commuted into assignments of land revenue, i.e., made payable by land He was not consulted or enquired at the time of Inam Settlement Any enquiry made, records prepared or settlement entered into behind his back is neither binding on him nor can be acted upon to his prejudice The Inam Commissioner dealt with only the inamdar and settled only his right to receive or collect the melwaram (representing the Government dues or assessment assigned) on lands technically termed "Rent Free", but actually not so, and not with the lands themselves or the right to occupy them or with the occupants, of the land, as distinct from the inamdars, the assignees of the public revenue It is the occupancy ryot, who is the producer of the revenue and the owner of the land. The right of the occupancy ryot was not affected by the title deed or the Fair Inam Register, which formed the basis for its issue The Inam Settlement was not intended to disturb any of the ryots' existing rights. The grant of a sanad or title deed in inam did not change the tenure of the land It was not within the scope of the authority of the Inam Commissioner to determine the relationship between the melwaramdar (Inamdar) and the (Kudiwaramdar) Occupancy ryot "Land" and "Lands" used in the Title Deeds issued by the Inam Commissioner prior to the passing of Act VIII of 1869, and in Act IV of 1862, and Act IV of 1866, are misnomers for "land revenue", which error is remedied by Act VIII of 1869 and by the insertion of the words "consisting of the right to the Government revenue in between the words "Inam" and "land" in the title deeds to be issued thereafter Therefore the true meaning and import of the records of enquiry, the registers prepared and the title deeds issued prior to the passing of Act VIII 1869 can be understood only if they are construed and interpreted in the light of the declaration contained in the remedial Act VIII of 1869 and not otherwise If they are not so construed the mischief, sought to be remedied by that Act, will continue to be perpetrated, and the rights of the occupancy ryot, which were neither investigated, inquired into, nor dealt with by the Inam Commissioner, will be prejudicially affected The public accounts, from which the information required to fill up the Inam registers, were gathered recorded only the names in respect of revenue paying lands of the persons from whom the public revenue on such lands are due or in respect of rent free lands (meaning lands paying revenue to others and not to the State) the names of the persons or institutions to whom such revenue is assigned or made over for collection, they cannot be said to disclose the names of the ryots in occupation of the particular lands, except where both the occupancy ryot and the inamdar happened to be the same individual

In ancient India, as well as after British acquisition of the territory, the ryot or cultivating occupant was not only at liberty to occupy for cultivation any vacant land within his village, but he was encouraged to so occupy and cultivate, because the public revenue depended on the extent of occupied and cultivated land, by making the land already occupied by him, rent free, or if already rent free, making it a condition for such exemption from payment of the assessment The consent of the State—Collector—to such occupation is only a fiscal arrangement to enable the State to register the liabilities of the cultivators.

Registry of transfers was only to safeguard the interests of the transferor to avoid his liability to be proceeded against for the public assessment and for the Government to know from whom the public revenue was due The villager has even now a preferential right for the dharkhast of land in his village This is a relic of the past proving the ryot's right and liberty to occupy unoccupied land in his village

The obligation to pay tasdic allowance to temples, mosques and other religious establishments was passed on to the British Government by the previous Governments These payments being obligatory, where they were ready cash payments to avoid the cost and trouble of collection depending on fluctuating productions to make such unavoidable payments, they were converted by the early British Administrators into payments from land, by assignments of land revenue, wherever possible, especially from lands held by or in the possession of the persons in charge of such institutions or establishments, or from lands held by the service holders, if such payments are for services in, either exclusively or combined with the obligation to maintain in an efficient condition, such institutions or from lands held by other occupancy ryots. Where the lands from which the land revenue was so assigned were in the occupation and possession of the persons to whom they were so assigned, they instead of paying the land revenue to the State appropriated the same for the purposes of the grant namely the support of, or service in the institutions or both. That is why such occupancy ryots, who became the inamdars or assignees of the assessment, of the lands, had and continue to have a beneficiary interest in the said lands. If the lands were held by other occupancy ryots, the assignees of the revenue collected the revenue on the authority of the grant orders The assignments of revenue are termed public endowments, their objects being of a public and permanent nature.

The public endowments attached to most of the mosques, temples, and other religious establishments were, in respect of the larger ones, in the hands of Committees to whom the Government handed over control, as a matter of policy, under Act XX of 1863, and in respect of the smaller ones, in charge of hereditary trustees, over whom there was no public control. The Board of Revenue, which had the power of superintendence over, and the District Collectors as its local agents, will have the records relating to such larger institutions

The public endowments being assignments of revenue were and are also called inams, as all assignments of revenue are called They were one species of inams, but are all unenfranchised inams Other inams being either personal or for services past or present have all been enfranchised by the original Inam Commission or later by the Board of Revenue acting in exercise of its power as Inam Commission

Lands, from which the revenue was made payable, in lieu of ready cash payments payable by the State, to the grantees, instead of to the State, were classified as "rent free" lands or "Inam" lands to distinguish them from revenue paying lands or lands from which the revenue was payable direct to the State The lands so classified as "rent free" or "Inam" were not actually unassessed lands as the word "rent-free" misleadingly imports. They were originally fully assessed lands, but the assessment, either in whole or in part, was assigned to some person or institution, in lieu of ready money or cash payable by the State The assignees of the revenue were called the inamdars, whether they be the occupancy ryots themselves or others or institutions

The right of the occupancy ryot, or the husbandman who cultivated the land and made it yield or produce, is distinct and separate from the right of the Inamdar who had only a right to the Government's share of the produce of the land in his occupancy or in other's occupancy This right remained the same whether

the melwaram or the Government's share of the produce in kind or commuted into its money value and termed 'assessment' is paid to the Government, or to the grantee, be he the inamdar or the Zamindar To the occupancy ryot the incidents of his tenure remained the same in respect of "revenue paying" and "rent free" lands He held the land subject to the payment of revenue

The tenure or classification of the land is determined by the authority to whom the assessment is payable, the State direct, the Zamindar or the inamdar, "It is "ryotwari" when the assessment is paid direct to the State, "Zamindary" when the assessment is paid to the Zamindar, and "Inam" when the assessment is paid to the inamdar The term "Inam" thus, when applied to the grant, meant the assessment only and when applied to land its classification based on the fact that the assessment was payable to the grantee, the inamdar, in inam 'Tenure' originally meant assessment, and later "classification" based on the authority to whom the assessment was payable This close connection and similarity between the "tax paying" and "tax free" lands was recognised ever since the commencement of the British Administration. The rights of the occupancy ryot remained the same whether the land was rent paying or rent free".

The value of the land to the Government in ancient India and in the nineteenth century was its annual assessment So the payments made from or by land revenue were termed payments from or by land The terms "land" and "land revenue" were used synonymously and interchanged It was because of this indifferent use of the words, the land for the "revenue" produced by it, **i.e.**, the producer for the produced, there was need for the declaratory Regulation IV of 1822 to safeguard and protect the interests of the cultivators, the actual proprietors of the soil, against the infringement of their rights by the assignees of the land revenue or rent collectors, or Zamindars, by whatever name they were called, after the Zamindary settlement, and during the triennial and decennial lease settlements, and the declaratory Act VIII of 1869 after the Inam Settlement. These declaratory laws recognised and protected the rights of actual cultivators to occupancy

The value of the land to the ryot was the value of the surplus that he could have after meeting from the produce, the cost of cultivation, including the wages of the casual hired labourers and the subsistence allowance of the permanent labourers, (slaves as they were called then and now termed pannayals) and paying the public assessment This value varied with the weight of public assessment But the right of occupancy of the land always existed and continued to be hereditary, transferable, saleable and indeterminable, except by due process of law and that for default of payment of the public dues

To insure that the grants of land revenue or money grants made by the British Government or by the ancient native Governments and confirmed or continued by the British Government are srtictly applied to the purpose for which they have been granted and are not diverted from that purpose, to the use or benefits of persons who have no claim upon the State, Regulations IV and VI of 1831 and Act XXXI of 1836 were passed, restricting the alienation of such rights either **inter vivos** or by law Courts The power to decide on such claims for or on grants of money or of land revenue was exclusively reserved to the Governor in Council But the restrictions imposed were in respect of grants of money or of land revenue and not on the lands which produced the land revenue. The occupancy right in land always was alienable, transferable and saleable, and claims to the occupancy were always determinable or adjudicable by the established Courts of justice It was only the restrictions in alienability on grants of land revenue technically termed inams, and in their adjudicability by the established civil Courts, that were, in

respect of enfranchised inams removed by Act IV of 1862 and Act IV of 1866 This is declared by Act VIII of 1869.

The alienability of the occupancy right in land as already stated depended on the margin of profit over and above what was necessary for the continuation of cultivation and the dues to the Government Due to the heavy exactions of the native Governments especially under Muhammedan rule it was negligible Land was the means of livelihood only, to the occupancy ryots whose hereditary occupation was husbandry It had no saleable value though there was no restriction on its alienation The distinction between the grant of "land revenue" and the grant of "land" from which it is derived was in a great measure lost But the proprietorship did not pass from the occupancy ryot to the ruling power at any time. ..

The saleable value of lands (or occupancy right in the soil) also fluctuated with the variations in the price of staple products Their value being low in the early part of the nineteenth century alienation of land or occupancy right was rare Occupation of land was for mere sustenance and what was saleable in rent free lands or inam lands was only the assessment, which was inalienable under Regulations IV and VI of 1831 and Act XXXI of 1836, or the value of improvements, if any, on the land for the sale of which there was no restriction In the absence of saleable value for lands, they could not be offered or accepted, as security. But at the same time the Government revenue depended upon the extent of cultivation of occupied land So to make the occupancy ryot cultivate his holding and to cultivate more, in order to increase the Government revenue, the assessment had to be reduced successively to make cultivation profitable and to make the ryots stick to their holdings and avoid relinquishments of unprofitable holdings, or portions thereof. Such reductions in assessment were given also for inam lands classified as inam (vide column 7 of the H I R Register) showing that in respect of the occupancy right or right in land, both revenue, paying and revenue free lands stood on the same footing No doubt such reductions were not given in respect of lands held in inam in Zamindaris or in whole inam villages till the passing of Madras Act XXIX of 1956 as the general reduction of rent was not applicable to Zamindari tracts in respect of which the peishcush was unalterable, by the permanent settlement

By limiting the State demand by largely reducing the rent or public dues or the Government share of the produce, from as nearly as possible the whole to something more than half in theory but less than half in practice of the profits of the cultivator, thereby giving a margin of profit over and above what was necessary for the continuance of his cultivation Government transferred his interest in his land into a property which possesses value not only to the husbandman who cultivated it but also to others.

Even in spite of such reductions of the Government assessment, the value of land (occupancy right) remained low during the latter half of the nineteenth century owing to the low value of the staple products and the famines (1876) By the passing of the Transfer of Property Act in 1882, the recognition of property right in occupancy of land was complete Lands or occupancy rights began to change hands Lands were accepted and given as security for loans Due to the insignificantly negligible and low value of the lands, transfer of the occupancy right often took place without registration and even withuot written deeds, by mere handing over possession, such transfers being in many cases of value less than Rs 100 as such transfers need no deed or registration and are valid even before and after the passing of the Registration and Transfer of Property Acts

The survey and revenue settlement in the Madras State commenced in 1855 and continued throughout the 19th century. The assessment rate per acre was

fixed at half the commuted money value of the net produce giving allowance for the viscissitudes of the season and for merchants' profits It ranged from Rs 0-6-0 or 37 paisa to Rs 3-50 for dry lands and from Rs 2 to Rs. 8 for wet lands The annual value of the occupancy right to the ryot was therefore equivalent to the assessment he paid to the State or to the grantee of the said assessment for lands classified as Inams For redemption of the land revenue 25 times the assessment was taken as the capitalised value For the redemption of the quit rent 20 times the quit rent was taken as the capitalised value.

The value of the occupancy to the ryot, i.e., the capitalised value of the assessment fixed, per acre ranged from Rs 9-37 to Rs 87-50 for dry and Rs 50 to Rs 200 for wet land. Under the Madras Court Fees and Suits Valuation Act, at present the market value of assessed land is taken at 30 times the survey assessment

The Inam Commission was established in 1858 and continued its operations till 1870 All inams except the religious and charitable inams and certain village service inams were enfranchised. The village service inams were later enfranchised. But the religious and charitable inams were left out from enfranchisement and remain unenfranchised because they served permanent objects By enfranchisement is meant freeing from conditions of service and|or other restrictions This was effected by the offer of an equivalent annual quit rent to be paid to Government. Enfranchised personal inams were exempted from the operation of Regulation IV of 1831 Acts XXXI of 1836 and XXIII of 1838 by Act IV of 1862 and enfranchised village or other revenue or police service inams were exempted from the operation of Regulation VI of 1831 by Act VI of 1866.

The unenfranchised inams because they were confirmed and continued, cannot give to Government any more right than what they actually had over them before such confirmation, or continuance. The inam content in respect of the unenfranchised inams cannot differ from those of enfranchised inams except in respect of the quantum, in respect of the quality, that is to say, the nature of the right, it is the same, that is, a grant of the land revenue and not of the land The inam content, which at the time of the Inam Settlement about more than a century back, was only the revenue derived or drawn from land, cannot grow and become the land itself by the passage of time. The title to land which arose in antiquity from occupation prior to the British acquisition of the territory —as evidenced from the Huzur Inam Registers—and not subject to any conditions or limitations other than a liability to the public dues to the inamdars, be he the occupancy ryot or some other, to whom such public dues are assigned cannot be converted into conditional Crown grants by the mere lapse of time.

As title to land or right of occupancy in ancient India arose from first occupation and cultivation and not from grants from the sovereign, the proprietary right in land under occupation at the time of British acquisition of the territories, vested in the occupancy ryots thereof. In the alternative, by reason of recognised possession from long before the British acquisition of the territories, there must be a presumptive title in the family of the occupants, or their heirs or successors or assigns, be they the inamdars or others. The law of prescription and limitation is applicable to the occupancy right of land as distinguished from its applicability to the assessment on occupied land, the two rights are separable and independent The occupation of land having been recognised, the occupancy ryot acquired an indefeasible title to the land under his occupation subject only to the payment of public dues, the assessment, be it payable to the Government or its assignee the inamdar, be he the occupancy ryot himself or any other person The issue of a title deed in respect of any occupied land by the Collectors immediately after British acquisition of the territory or by

the Inam Commissioner later was only in recognition, confirmation or continuance of the title to the revenue assigned to the inamdar. The occupancy ryots did not derive their occupancy rights from or through such title deeds in respect of occupied lands. The fact that lands classified as "inam" included wet lands, and garden lands also as per paimash or the survey accounts of 1801 and 1802 indicate that such lands were really occupied land and not waste lands. Even where unoccupied waste land is granted, the assignment may be subject to or not subject to the payment of revenue. Where it is not subject to the payment of revenue, the revenue is granted to the assignee But in either case the person who is put in possession of the unoccupied waste land becomes the occupancy ryot thereof. This principle has been clearly declared in G O No 311, Revenue, dated 8th February, 1907.

When land had no saleable value transfers took place not of the land but of the improvements thereon, **e.g.,** the well, channel, embankments formed, or terracing effected and so forth, and with the transfer of ownership of the improvements passed the right to occupy the land, as the one was useless without the other and mostly inseparable The present proprietors did not make money from the land but spent money on it.

Under the influence of peace and security from famine, resulting from a settled administration, the population increased, putting pressure on land and instead of the State seeking tenants to cultivate lands to produce revenue, the tenants began to seek land from which to gain livelihood. The development of the country with the increase of population, the rise in prices, and the consequent enhancement of the profits of cultivation, created competition for land Expansion of population and improvement of communications increased the cultivated area at the same time diminishing the area available for extension of cultivation Competition for land became keener, prices rose and occupancy right became more valuable Occupancy right which possessed no value to any but the husbandman and even to him of little saleable value in the nineteenth century became very valuable property during the twentieth century Legislative enactments, the silent influence of the British legal system and the occidental leanings of Courts, afforded a very high degree of protection to landed property, that is value increased The protection which the law afford to the ryot at the expense of land revenue and therefore of the general taxpayer secured to the actual cultivator of the soil security of livelihood and enjoyment of a due proportion of the fruits of his labour, and restored to him, in part at least, that assured position of which the orient Government's mistake had deprived him Lands became valuable as security The very love of the peasants for their land to which they cling most strongly constituted to make it more valuable as security. Land began to change hands from the cultivating ryots—the yeomen classes-cultivating their own lands and the very backbone of the people of India, to the money-lending class Letting land on leases of tenancy to the cultivating husbandmen began.

Only when the occupancy right in land became valuable and saleable, did the Government of India by its resolution in the Department of Agriculture, Revenue and Commeıce, No I-141, dated 6th February, 1872 formulate rules for the first time for the permanent alienation of land—unoccupied wastes—the proprietary right in which was claimed to be vested in the State whether the land is assessed to land revenue or not and for the alienation of land revenue in the letter of the Government of India, No 2486-149, dated 17th November, 1891, Government of India's Circulaı No. II-368, dated 16th October, 1896, etc. Till then B S O 15, as found in the Board's Standing Orders (1900 edition) was in force, and the proprietary right in the soil by the Government was neither claimed nor asserted as against the rights of the villagers The rights of the ryots to

occupy unoccupied lands was only regulated, and their occupation registered. Their rights are still preserved to a certain extent in their reference under Dharkash rules for lands in their respective villages.

Had it not been for the recognition of the permanent right of occupancy of the peasant proprietor he would not have spent large amounts to improve the lands by digging wells, terracing, forming embankments or irrigation channels, etc., to make them productive

The prescriptive right and presumptive title to property in land have grown out of unquestioned, undisturbed and permissive possession and enjoyment for more than two centuries, tacitly allowed and recognised, which the State dared not to touch but were eager to protect as could be seen from Regulation IV of 1822 and Act VIII of 1869. The ruling power, more than a century back recognised the injustice and inequity of throwing upon the occupancy ryot the risk and expense of asserting and maintaining his occupancy right in the civil Courts against apprehended infringement and questioning of such right by the assignees of Government revenue. While regretting litigation springing up as a consequence of their actions, the ruling power in 1868, deemed it absolutely necessary, to protect the proprietors of the soil, against their rights being infringed or questioned by inamdars, possessing only the Government's right to a share of the produce and passed a short declaratory Act setting at rest all questions as to the intent and meaning of the title deeds issued without in any way altering their forms—to prevent the creation of a feeling of distrust in the minds of inamdars, which the latter course might have obviously tended to foster Owing to the neglect and failure of the State to institute any inquiry into the occupancy right owned by the present proprietor and confining the inquiries only to the right to the collection or appropriation of the public dues by the grantees thereof by more than 1½ centuries after the establishment of stable administration in the country and owing to the tacit recognition of their occupancy rights with incidental rights of transfer succession, etc , so long, by established usages and legal enactments, much of the evidence that could have been preserved by them or their successors and assigns have been lost to them What evidence is available is with the Government The paimash accounts, original survey records, Daraiafti statements, are such records which are required to be preserved permanently The occupancy ryots who apply for them are neither able to get them nor even to know where they have been kept and preserved The original sannads were recovered by the Collector under the penal provisions of Regulation XXXI of 1802 and even if by chance, available with anyone, have lost their validity under the express provisions of the same Regulation. In respect of grants made by the Government after the British acquisition of the territory the Government will have the records relating to and showing the conditions, if any, attached to those grants.

Though more than a century back the Government recognised the need and justice of the principle not to disturb occupancy as is evident from the rules, regulations and laws on the subject as laid down in the Board's Standing Orders and as interpreted by Courts, and even now the policy of the Government is to recognise and give rights of permanent occupancy to cultivating tenants subject only to the payment of rents due, it is rather paradoxical that many of the occupancy ryots are sought to be uprooted from their occupancy which they have been regarding as inheritance for their children and which has been all along subjected to sale and purchase and borrowing and lending.

The Inam tenure as recognised for long and declared so by the Government and its officers as the liability to pay to the assignee thereof, the assessment, in full or less the quit rent or jodi, payable to Government, its abolition, would and could only amount to the cancellation of that liability and no more To

construe it differently would in effect be expropriation without compensation of property in land with the benefit of all improvements effected on the land by the occupancy ryots, their successors or assigns, at their cost during more than two centuries.

The Privy Council in MAHARAJA MOHESHWAR SINGH v. THE GOVERNMENT OF INDIA laid down the very salutary principle that in interpreting and carrying into effect statutes, severe and expropriatory in nature, full force and effect should be given to those provisions which are manifestly intended to protect the rights of property.

The enactment of the presumption in section 44 of Act XXX of 1963 has shifted the burden of proof of occupancy right from the inamdar to the occupancy ryot, his successors or assigns, in effect overriding Regulation IV of 1822 and Act VIII of 1869, the Government itself taking the position of the inamdars, the religious and charitable institutions By such belated shifting of the burden of proof, the occupancy ryots, their successors or assignees have lost the advantage of much of the oral and written testimony that they might have had.

When holders of alienated lands were given unrestricted occupancy right in property in such lands in the middle of the nineteenth century, persons who have acquired land after 1st April, 1960 for valuable consideration, during the period when, the law on the subject did not apply nor prohibit but recognised them are now denied property right for those lands which they have developed and improved at their own cost and labour.

The lands having been already fully assessed to revenue, a **second time,** from 1956, and such assessment being paid to Government direct ever since then, they have already become ryotwari The effect of full assessment and that assessment made payable to the State is to convert the land into ryotwari. The incidents of an inam tenure can no longer remain attached to it The liability to pay assessment to the inamdar also gets extinguished The inam content having been extinguished the character and classification of the land as inam also gets altered, and without the inam content such lands cannot be attracted by Act XXX of 1963.

DR. ZAKIR HUSAIN

Death came suddenly to the President, Dr Zakir Husain, as a result of a heart attack and plunged the nation in grief Dr. Zakir Husain was the third President to hold the exalted office—but the first to die while in office. His death removes from the scene one more eminent son of India who was closely associated with the Father of the Nation.

Dr Zakir Husain was one of those Muslims who responded to the call of Gandhiji and abandoning the studies in Law, he, along with other nationalistic minded Muslims, founded the Jamia Millia Islamia, and under his care made it the centre of nationalist education for Muslims on the model of the various Vidya Peeths set up by Mahatma Gandhi

The greatness of Dr Zakir Husain was that he was secular in outlook He was secular in the best sense of the term, and he respected his own religion and that of others and expected equal respect from those of other religions. As a man Dr Husain was a human, gentle, warm and compassionate being.

Dr. Zakir Husain was essentially a scholar, and was more at home with his books, and a great part of his life was dedicated to the cause of education. To him Education was a prime instrument of national purpose, and the quality of education was inescapably involved in the quality of the nation.

With a scholar's typical outlook he was above politics , above communalism. To him knowledge knew no frontiers His pledge when he took office as President of India was moving and brings out the culture and innate nobility of his mind. It pained him to see the unseemly scramble for power among his country's political leaders. The growing political turmoils, communal outbursts, factionalism, and laxity in administration brought out the anguish in his soul. He believed in work and exhorted his country men to work, work and more work, silent and sincere work

It is a great pity, and it is to the misfortune of Bharath, that Death should snatch away suddenly one who had pledged to make 'this home strong and beautiful, a worthy home for a great people'. Public life will be the poorer by his death.

Dr. Zakir Husain's death at this juncture of the nations' political history creates the problem of electing a successor, which is no longer the simple matter it was hitherto. The Congress party then controlled Parliament and all State Legislatures and the election of the President was a simple matter It is no longer so now, in view of the changed circumstances. It would be unfortunate if the election should be hotly contested and acrimonious, for the President of the Indian Republic is like the Queen in England, and it would be best in the interests of the nation that an eminent man is chosen through a consensus among the political parties in India without contest. We have had three great Presidents, who have set up a great tradition, and may the fourth be no less eminent or great than his predecessors.

RETIREMENT OF SRI M. ANANTANARAYANAN—CHIEF JUSTICE.

On Wednesday the 30th April, 1969, Sri M. Anantanarayanan, Chief Justice laid down the robes of Office Sri M Anantanarayanan succeeded Sri P Chandra Reddy as Chief Justice in July, 1966 He had the distinction of being the first member of the Indian Civil Service to be made the permanent Chief Justice of the Madras High Court He was elevated to the Bench in August, 1956 and before his appointment, he served as a District Judge, during which period, he acquired a rich and varied experience in the judicial field. After a tenure of 10 years as a Judge, of which three were as Chief Justice, Sri M Anantanarayanan now lays down the robes of office.

As a Judge, Sri M Anantanarayanan has had a long and distinguished record of service He had a passion for rendering justice at any cost. He believed, and rightly so, that the quality of Justice is even more important in any decision than the Judicial content of Law He was never known to be harsh to the Advocates appearing before him, and by temperament he could not be so also.

During his tenure of office he heard and disposed of cases on all subjects except, possibly, cases in Income-tax Law His judgments are luminous and with his felicity of expression, they may be said to be of high literary content also.

Since Independence, not only are areas of law changing but the substance and core are being subject to change The growth of Executive power today is enormous. There is need to check the arbitrariness or caprice or the exercise of unfettered power, by those in authority But there should also be proper appreciation of the difficulties of administrators, the magnitude of their tasks or the character of their power His Lordship felt that one should neither be carried away by a passion to check arbitrariness nor be blind to administrative problems but should strike a happy balance of approach Referring to the jurisdiction of Courts. under Article 226 of the Constitution, he has said in his farewell address "The very existence of this jurisdiction is a wholesome good which acts as a check against thoughtless, capricious or unfettered exercise of power. But the jurisdiction will stultify itself, if hand, in hand with this perspective, there is not also on the part of those moulding and shaping this jurisdiction, a wide knowledge of the administrative field, and a realisation of its restrictions and difficulties "

Though retired from Judicial service, there is no likelihood of Sri M. Anantanarayanan suffering from *ennui* because of his vast and varied interests outside Law. He is well versed in many languages and is a scholar in Tamil He is the author of several books in English as well as in Tamil He is deeply interested in Carnatic Music He has had association with academic work also as Director of Legal Studies of the Madras Law College We hope that in his retirement he will have the time and leisure, to pursue these many sided interests, which he could not spare while as a Judge.

We wish him many happy years of retired yet " active " life.

RETIREMENT OF MR. JUSTICE K. SRINIVASAN.

On 30th April, 1969, Sri K Srinivasan, puisne Judge of the Madras High Court also laid down the robes of office. Also a member of the Indian Civil Service he has a long and distinguished record of service of 30 years on the Judicial side. He was elevated to the Bench in 1960.

The large number of Advocates who had assembled at his Court for the Farewell function shared a feeling of regret that the tenure of office of a pleasant Judge who had endeared himself to the Bar by his sense of humour and wit, his intelligence and quick grasp of the subject and his uniform courtesy and comradeship, should come to an end Justice Srinivasan however, thinks otherwise He welcomes this day of retirement as he feels, that if one has done one's duty and achieved something, one has earned one's rest and should welcome the rest

Few can question the fact that during his Judgeship he had a long and distinguished tenure of service, a record of service upon which he can look back with satisfaction and pride. After serving as a District Judge for 11 years, he was appointed as Chairman of the Sales Tax Appellate Tribunal He has done admirable work as Secretary of the Law Commission As a Judge his dispensation of Justice was of the highest order. He has dealt with all branches of the law and special mention may be made of his disposal of Tax cases

Though officially 62 years of age Sri K Srinivasan is in physical trim, full of energy and mental alertness It would be a pity if his services are not availed by the Government in the cause of the country, and it is to be hoped that though Mr. Srinivasan may prefer to rest after retirement, he can be persuaded to change his mind and reenter the list of 'active' service.

OUR NEW CHIEF JUSTICE AND EXPECTATIONS.

The Chief Justiceship of the High Court is a most important and honoured post The High Court is the highest Court in the State and in the great majority of cases, at all times, its decisions are final. The High Court has been regarded justly as the Temple of Justice and the refuge of the oppressed. Among the Judges, the Chief Justice is **primus inter pares.** He alone as the head of the judicial administration has a special part to play in the buildingup of its traditions. He sets the tone and pace of the administration. He has a voice in the appointment of puisne Judges. He controls the subordinate judiciary. His administrative duties are strenuous Apropos of this, a former Chief Justice has written · "Much of what a Chief Justice has to do is not known to the public. Almost everyday problems would present themselves which require a steadfast adherence to principles and policies and a false step might lead to a crumbling up albeit in part of a system so carefully built up during the last hundred years." It was no wonder that, during the British regime in this country, the Chief Justiceship 'was reserved practically for the Britisher' and only a Barrister was held to be competent to fill the post The advent of Independence brought about significant changes in outlook. Some of the old notions and fads were washed out Even a member of the Indian Civil Service could now fill the post, and the Chief Justice is always to be an Indian citizen. The abolition of the far-away jurisdiction of the Judicial Committee and the establishment of the Supreme Court under the Constitution and the reduction in the pay of the Judges have to some extent affected the image of the High Court in the public mind in regard to its importance. But as against these, the Constitution has vested in the High Court an enlarged and vast jurisdiction under Articles 226 and 227. The words of Sir Arthur Collins uttered at the time of the High Court moving into its present location in July 1892, that the Judges will endeavour to do their duty in the fear of God and without fear of man, and his peroration: "I fervently hope that long after You and I . . have passed away to that undiscovered country, of which we know so little, there may always continue to be found, men of ability and courage, who will administer the law in these Courts without distinction of caste, colour or race", are as valid to-day as ever before The post of Chief Justice is one of great responsibility The Chief Justice is not the holder of a merely prestigious post The incumbent is not to be lost in its external trappings. He is, as it were, a trustee for ensuring absolute independence and impartiality in the administration of justice. He has to reflect, whenever the occasion demands it, the feelings and sentiments of all those vitally concerned with the administration of justice, effectively and correctly, to the Government. Dr P. V Rajamannar, as the First Indian Chief Justice of the High Court in Independent India has set up high traditions for his successors in the Office to follow. In these days of tumult and turmoil, when even the Judiciary is not spared from criticism, it is all the more necessary that the Chief

Justice should combine firmness with tact, wisdom with prudence and patience with discipline.

Justice Veeraswami becomes the fifth incumbent of the post of Chief Justice after the commencement of the Constitution. He comes to the post with rich and varied experience in all branches of the law both as a practitioner at the Bar and as a puisne Judge of the High Court for over eight years. He is, also endowed with the right temperament He will have a sufficiently long period of about seven years to leave his mark. We hope that the new Chief Justice will discharge the duties of his high office in the best traditions of the High Court. We convey to him our hearty felicitations and assure him of our co-operation.

BOOK REVIEW

COMMENTARIES ON THE INDIAN EVIDENCE ACT. By *Sri V. B. Raju*, M.A., I.C.S., JUDGE, GUJARAT HIGH COURT VOL. I. (Publishers : Eastern Book Company, Lucknow and Delhi). Third Edition, 1969. Price Rs 60 per set.

A book from the pen of the author is bound to be welcome. With his high credentials his Commentaries on the Indian Evidence Act will command great respect. The book is laid in two volumes Vol. I covers sections 1 to 92. The Author has analysed each section thoroughly and provided useful notes He has also stated his own views in regard to a number of matters. His criticism of the Privy Council's view as to the meaning of 'fact discovered' in section 27 of the Evidence Act has received support from recent rulings of the Supreme Court. One or two points may well be considered by the Author. For one thing, unless both volumes have been released and the set is with a reader he may not get information on some points fully On page 36, for proof of custom the reader is directed to Appendix C, on page 37, for proof of intention or knowledge he is asked to see Appendix E, and again on page 54, for appreciation of evidence he is referred to Appendix A. Similarly on page 425, in note 25, the reader is directed to A. I.R. 1934 P.C. in note 7 to section 112. None of the Appendices mentioned nor section 112 with notes thereunder find a place in Volume I. Secondly, at places there seem to be repetitions or superfluous matter Note 4 (*c*) on page 58 duplicates what is found in Note 1 (b) on page 56. On page 310 the caption under Note 7 is discovery of person for witness and on page 311 under Note 7 (1) the caption is discovery of witness. On page 18, it is stated : " Relevant is used in the Act with two distinct meanings (1) connected, and (2) admissible When used in the second sense relevant means admissible." The last sentence is superfluous. Thirdly, some of the comments given are too jejune and do not throw much light. Some specimens are : page 82, Identity of Animal. See 29 I.C 72; page 86, Beard. A.I.R. 1925 All 405; page 210, Master and Servant. See 19 Cr. 789. In regard to these, it would have been more satisfactory if before the citations were given a sentence at least in each case stating the law to be found had been given. Fourthly—and this is a feature detracting from the excellence of the work—there are too many printing mistakes to be overlooked A few instances may be given: on page 16, line 24, " Bantham" should be " Bentham," on page 19, line 1, " illegably obtained " should be "illegally obtained", on page 35, line 23, "little tattle" should be "tittle tattle"; on page 37, line 16, "illegimate" should be "illegitimate", on page 196, line 15, " driving the case " should be " driving the car "; on page 226, line 2, " A.I.R. 1960 All. 1 (F B.) Reserved " should read " A I R. 1960 All. 1 (F.B) Reversed "; on page 238, line 3 " has confession true " should be " his confession is true," and in the same page at line 17, "in step" should read "in sleep", on page 316, line 14, " accompanying discloser " should be " accompanying disclosure ", on page 606, line 6 and at page 299, line 17, Article 29 (2) should be Article 20 (2), and Article 29 (3) should be Article 20 (3) respectively Notwithstanding these, the book will remain a welcome contribution to the literature on the law of Evidence.

BHATTACHARJEE ON GENERAL PRINCIPLES OF INSURANCE LAW. (Publishers : Eastern Law House Private Ltd , Calcutta) 1969 Price Rs. 10.

Having regard to the pace at which life is lived at the present time and the rapid industrialisation of the country throwing up various kinds of risks and hazards, insurance law has gained new dimensions and is taking on a new look. In fact insurance has become a worldwide subject Major legislations have been enacted such as the Life Insurance Corporation Act, the Marine Insurance Act, the Employees, State Insurance Act etc In his Preface, the author assures his readers: " A comprehensive treatise dealing with all aspects of insurance laws and their

application in India has been prepared and is already in the Press This preliminary volume covering the theoretical issues and introducing the general principles of Insurance Law is being offered as a sort of aperitif till such time as the main dish, that is, the main volume is ready " The bigger volume is a pleasure to come. The book under review is to serve only as an introduction thereto. The present work is divided into three chapters Chapter 1 deals with the characteristics of a Contract of Insurance ; Chapter 2 covers Marine Insurance and Chapter 3 sets out the principles relating to non-marine and non-life insurance. Some mistakes catch the eye while reading. On page 28, line 33, " liable " should be "liability"; on page 85, line 11 "constructed" should be "construed"; and on page 103, line 7, "Indiain Bilils of Lading Act" should be "Indian Bills of Lading Act " The book gives a clear and brief exposition of the basic principles underlying the subject with adequate references to English and Indian decisions As an introduction to the study of Insurance Law the book is sure to be of much assistance to all alike, lawyers, students and businessmen.

ANNOTATED SUPREME COURT RULES, 1966 INCLUDING SUPREME COURT (AMENDMENT) RULES, 1968. By *Ganpat Rai* (Publishers : Om Prakash, New Delhi. Copies can be had from the Author at 51, Panchkuin Road, New Delhi-1 and 45, Lawyers Chambers, Supreme Court Compound, Tilak Marg, New Delhi-1) Price Rs. 10.

Article 145 of the Constitution empowers the Supreme Court to frame rules from time to time relating to the practice and procedure before that Court, with the approval of the President. Such Rules will be subject to the provisions of any law made by Parliament Rules have been framed accordingly. An up-to-date publication of the Rules is bound to be highly valuable and of great assistance to the Advocates in their day-to-day work A useful feature of the present publication is its inclusion in an Appendix, the Examination Papers set for candidates for the Advocates on Record Examination conducted by the Supreme Court, covering the period 1959 to 1968 The author has given short annotations or notes to the Rules in many places referring to the decisions and rulings of the Supreme Court concerning them. They add to the utility of the book The book abounds in typographic mistakes from which practically no page is free The words "Bill of Costate" in bold letters on the front cover page of the book are baffling and presumably should be " Bill of Costs."

CINEMATOGRAPH CODE. By *P. Ramareddi*. (Publishers : Cinematograph Laws Research Institute, Hyderabad-2). 1968-69. Price Rs. 31.

The Cinema Industry is today a major industry of the country and film production is developing phenomenally. The object of cinemas is primarily to afford amusement and entertainment. An incidental effect is educating the audience. It may be that the morals of the people cannot be kept pure by mere inhibition of various things One cannot save the chick by merely washing the egg from outside. That does not however mean that a *carte blanche* should be given to exhibit in a film scenes and incidents tending to cater to the prurient and pornographic tastes of men and women. One sees in nature things pertaining to sex or crimes. People notice them casually only and their interest is not held. Nor is any damage done. The situation in a theatre is different People go there with the deliberate intention of watching the film for two or three hours and the successive parts of the film hold the attention of the audience and tend to draw pointed attention to what is presented and how the climax is achieved The films thus excite the imagination of the audience Scope is thus afforded to influence the minds of the audience and indirectly their morals as well In that away arises the need for the licensing of films. The institution of a *censor morum* is to be found from very early times. What principles should operate in regulating films for exhibition, what type of restrictions should be adopted in our country and similar matters would depend

upon a variety of factors like our cultural heritage, attitude to religion, respect for women, sanctity of marriage etc. The book under notice brings together the Central and all State Cinema (Regulation) Acts with Rules, case-law, Cinematograph Rules, Censorship Rules, Instructions, General Principles on Censorship being rules issued by the Government of India from time to time, a complete set of Standard Agreement Forms of film industry, Minimum Rates of Wages, conveyance and working hours allowance etc. The book under notice is a welcome addition to the other publications dealing with film industry in India. The people engaged in or associated with the various aspects of production and exhibition of films are sure to be benefited and will find the publication of great assistance The book deals almost exhaustively with the law relating to cinemas both at the Central and State level The incorporation of the Entertainments Tax Acts would have probably made the work even more complete. The publication of specimen forms of contracts as between those engaged in the different branches of the cine industry is a happy feature. The author deserves to be congratulated for venturing on a book like this.

LAW ON SESSIONS TRIAL (in 2 Volumes) By *C K. Jayasimha Rao*, Advocate and *Mr Justice K. Bhimiah*. (Publishers : Bharadwaja Publications Ltd., Bangalore-9). Vol. 1, 1968. Price Rs. 70 per set

The book is written by men who know the subject thoroughly. One of the authors is a judge of the High Court In all modesty, they have stated, *a la mode* Newton, that in preparing the work under review they were only attempting to gather pebbles on the shores of the ocean of law The book constitutes a very competent survey of the law relating to Sessions trials It is intended to be a reference book on the decisions of the Privy Council, the Federal Court, the Supreme Court and the High Courts relating to offences triable by Sessions. The procedural aspect of the Sessions trials has been dealt with in the second volume by noticing important decisions of the Criminal Procedure Code and the Evidence Act. In Vol. I, the authors have brought together all the sections of the Indian Penal Code relating to the offences exclusively triable by the Court of Sessions. The authors have adopted an arrangement which will enable a busy lawyer to find the case law on any point under the particular section of the Code without any difficulty Offences against the State, offences relating to the Army, Navy and Air Force, false evidence and offences against Public Justice, offences relating to coin, offences relating to Government stamp, offences against public safety, convenience, decency and morals, offences affecting human life and body are dealt with in detail. The last topic has taken about 800 of the 900 and odd pages of Vol. I. In regard to each offence the relevant section of the Penal Code is set out, its requirements are stated; how the charge should run is indicated and the sentence that could be awarded is explained. The treatment is both careful and lucid. In a criminal trial a clear perception and grasp of the substantive and procedural law is necessary both on the part of the Prosecutor as well as on the part of the defence Counsel. The authors have endeavoured to present the principles of criminal law relating to Sessions trials in the form of a simple narrative referring to relevant case law. English decisions have also been cited where they are likely to be helpful. The presentation is analytical. The approach to the subject and the arrangement adopted are highly commendable The book is not dreary or forbidding. It holds one's attention throughout There are to be found a few mistakes which require correction. On page 5 top, "Offences against the property" should read "Offences against the State". On page 265 top, 271 top and 279 top, "Offences affecting Tril" should be "Offences affecting life". The book is, on the whole, a real contribution to the subject.

BINDING FORCE OF HIGH COURT DECISIONS.

By

V A. VENKATACHALAPATHY, B A ,B L ,

Joint Secretary to the Government of Tamil Nadu,

Law Department, Madras-9.

Article 141 of the Constitution of India states that the law declared by the Supreme Court shall be binding on all Courts within the territory of India Article 144 lays an obligation on all civil and judicial authorities in India to act in aid of the Supreme Court There is no provision corresponding to Articles 141 and 144 with reference to the law declared by the High Court A doubt has been raised whether the law declared by the High Court is binding on subordinate Courts This point may be examined with reference to the doctrine of precedent or *stare decisis.*

Reference to standard text-books on jurisprudence may not be out of place in this context. In *Salmond on Jurisprudence* (Twelfth 1966 Edition) the principles have been set out in the passages reproduced below .—

" 26 *The authority of precedents* —The importance of judicial precedents has always been a distinguishing characteristic of English law The great body of the common or unwritten law is almost entirely the product of decided cases, accumulated in an immense series of reports extending backwards with scarcely a break to the reign of Edward the First at the close of the thirteenth century Orthodox legal theory, indeed, long professed to regard the common law as customary law, and judicial decisions as merely evidence of custom and of the law derived therefrom. This was never much better than an admitted fiction. In practice, if not in theory, the common law of England has been created by the decisions of English judges. Neither Roman law, however, nor any of those modern systems which are founded upon it, allows such a degree of authority to precedent. They see no difference of kind between precedent and any other expression of expert legal opinion A book of reports and a text book are in the same legal category. They are both evidences of the law ; they are both instruments for the persuasion of judges ; but neither of them is anything more English law, on the other hand, draws a sharp distinction between them A judicial precedent speaks in England with authority ; it is not merely evidence of the law but a source of it , and the Courts are bound to follow the law that is so established.

* * * * *

(4) *Inconsistency with earlier decision of higher Court* —It is clear law that a precedent loses its binding force if the Court that decided it overlooked an inconsistent

decision of a higher Court If, for example, the Court of Appeal decides a case in ignorance of a decision of the House of Lords which went the other way, the decision of the Court of Appeal is *per incuriam*, and is not binding either on itself or on lower Courts ; on the contrary, it is the decision of the House of Lords that is binding. The same rule applies to precedents in other Courts, such as the Divisional Court.

* * * * *

(8) *Erroneous decisions*—We have seen that decisions contrary to statute or to previous higher judicial authority are without binding force

* * * * *

The rule that Courts are bound by decisions of higher Courts and in some instances by their own decisions suggests that such decisions, even though wrong, must stand as authority until overruled by yet higher authority An erroneous decision of the House of Lords on this principle can only be corrected by statute.*

* * * * *

28 *The hierarchy of authority*—The general rule is that a Court is bound by the decisions of all Courts higher than itself. A High Court judge cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow judgments of the House of Lords A corollary of the rule is that Courts are bound only by decisions of higher Courts and not by those of lower or equal rank A High Court judge is not bound by a previous High Court decision, though he will normally follow it on the principle of judicial comity, in order to avoid conflicts of authority and to secure certainty and uniformity in the administration of justice If he refuses to follow it, he cannot overrule it ; both decisions stand and the resulting antinomy must wait for a higher Court to settle "

In *Jurisprudence* by *Paton* (Second Edition, 1951), the position is set out in the following sentence at page 159 :—

" In England the Courts are imperatively bound by decisions of higher Courts in the same hierarchy, and the House of Lords, the Court of Appeal, and the Divisional Court are each bound by their own decisions "

At page 164, the author has referred to the reason behind the rule and it is that the individual caprice of the judge is controlled by the necessity of following binding precedents There, he has also referred to the observations in a decided case : " it is better to apply the law, which is the wisdom of a great many, than to act on one's individual impression ". It is stated that the community must be ruled by law and not by men, for then all are equally treated

* The House of Lords has in the *Practice Statement case*, (1966) 1 W L.R 1234 with reference to itself, made a departure for its well-known adherence to the doctrine of *stare decisis* This however does not affect the position of the other Courts in relation to the House of Lord and its decisions.—*Ed.*

In *The New Jurisprudence* by *Jenks* (First Edition, 1933) "the doctrine of precedent " has been defined in the following terms at page 99 .—

" The key to the importance of judiciary law is to be found in the doctrine of *precedent*, or *stare decisis*. By the theory of precedent, as understood in English-speaking countries, a decision by a competent Court of Justice upon a disputed point of law becomes, not merely a guide, but an authority, to be followed by all Courts of co-ordinate or inferior jurisdiction administering the same system, until it has been overruled by a Court of superior jurisdiction or by a statute of superior authority, *e g*, an Act of Parliament, or, possibly, until circumstances have so changed, that it is regarded as being no longer applicable. For, unlike statutory law, judiciary law, at any rate according to the English view, may become obsolete without formal repeal "

In *Halsbury's Laws of England* (Third Edition, Volume 22), the principle has been dealt with in detail in paragraphs 1686, 1687 and 1688 at pages 798-801. Briefly put, according to Halsbury, the decisions of the House of Lords upon questions of law must be followed by every inferior Court and are considered by the House to be binding on itself in its judicial character. Similarly, the decisions of the Court of Appeal upon questions of law must be followed by Courts of first instance. The decisions of the Divisional Courts upon questions of law are binding upon Courts of first instance.

So far as our country is concerned, the doubt seems to arise because of the absence of a provision similar to Article 141 regarding the decisions of the High Court. This by itself is of no consequence, when we consider the position which the High Court is by the Constitution designed to fill The High Court is a Court of Record and has all the powers of such a Court including the power to punish for contempt of itself (Article 215) The High Court has power, throughout the territories subject to its jurisdiction, to issue directions, orders and writs including the so called prerogative writs for any purpose, whether or not such purpose is for the enforcement of the Fundamental Rights conferred by the Constitution (Article 226) The High Court has the power of superintendence not only over Courts within the State but also over Tribunals in the State (Article 227) Article 235 of the Constitution may also be looked into in this connection That article no doubt deals with disciplinary or departmental control over the subordinate judiciary, but it makes it clear that the High Court has complete control over all subordinate Courts in the matter of posting, promotion, etc The provisions of the Constitution mentioned above must be taken as authority for the principle that the law declared by the High Court is binding on all Courts subordinate to it.

We may now refer to some relevant decisions on the point —

East India Commercial Co v *Collector of Customs*[1] One of the points which arose for decision in this case was whether the decision of a High Court on a point of law is binding on all inferior Tribunals within its territorial jurisdiction Of the three Judges who constituted the Bench, Sarkar, J. stated that he was not

1 (1963) 3 S.C.R. 338 . A.I.R. 1962 S.C 1898.

prepared to subscribe to the view that the decision of a High Court is so binding But Subba Rao, J (as he then was) speaking for himself and for Mudholkar, J. laid down the law in the following words :—

" This raises the question whether an administrative tribunal can ignore the law declared by the highest Court in the State and initiate proceedings in direct violation of the law so declared Under Article 215, every High Court shall be a Court of Record and shall have all the powers of such a Court including the power to punish for contempt of itself Under Article 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose to any person or authority, including in appropriate cases any Government, within its territorial jurisdiction Under Article 227 it has jurisdiction over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that Court and start proceedings in direct violation of it If a tribunal can do so, all the subordinate Courts can equally do so, for there is no specific provision, just like in the case of Supreme Court, making the law declared by High Court binding on subordinate Courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it Such obedience would also be conducive to their smooth working , otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer We, therefore, hold that the law declared by the highest Court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding."

A Full Bench of the Madras High Court had to consider this point in *Rama Subbarayalu* v *Rengammal*[2] Ramachandra Iyer, C J, delivering the Judgment on behalf of the Full Bench laid down the law thus —

" The normal rule as to the precedents is, that Subordinate Courts are bound in the absence of any decision of the Supreme Court, to followt he decision of the High Court to which they are subordinate Where, however, there is a conflict between two decisions of the High Court, the rule to be adopted is as follows : Where the conflict is between the judgment of a single Judge and a Bench or between a Bench and a larger Bench, the decision of the Bench or the larger Bench, as the case may be, will have to be followed But where the conflict is between two decisions both pronounced by a Bench consisting of the same number of Judges, and the Subordinate Court after a careful examination of the decision came to the conclusion that both of them directly apply to the case before it, it will then be at liberty to follow that decision which seems to it more correct, whether such decision be the later or the earlier one

To enable the Subordinate Court to do so, the two apparently conflicting decisions must directly relate to and expressly decide the question that arises before the Court ; otherwise a Subordinate Court should follow that ruling which specifically

2. (1962) 2 M.L J 318 I L R (1962) Mad 1001 . A.I.R. 1962 Mad. 450 (F B).

deals with the point It will not be open to it for example to follow the other decision which only impliedly or indirectly or by way of a mere observation gave expression to a contrary view "

Kamalammal v. *Venkatalakshmi*[3] In this case decided by Subba Rao, J. (as he then was) and N Rajagopala Ayyangar, J, the Judgment was delivered by the latter In the case before the Supreme Court, a single Judge of the High Court had refused to be bound by an earlier Judgment of a Full Bench Rajagopala Ayyangar, J., while deprecating this practice observed as follows :—

" There was a decision of the Full Bench which interpreted the texts and laid down the law on the topic and it is somewhat surprising that the learned Single Judge of the Court thought it proper to refuse to be bound by that judgment and proceeded on his own line of reasoning based on authorities several of which were discussed by the Full Bench relying merely on the statement by the Editor of Mayne's Hindu Law that the decision required reconsideration We cannot but deprecate this practice as it destroys the certainty of the law which the theory of judicial precedent seeks to establish Not merely convention but rules framed by several High Courts, require that where a learned Single Judge or a Division Bench does not agree with a Full Bench decision he or they should either make a reference to the Full Bench or place the papers before the Chief Justice for such a reference being made."

Prem Chandra v *Deputy Director of Consolidation*[4] This is a decision by a Full Bench of the Lucknow Bench of the Allahabad High Court. Desai, C J, held that a decision of a Bench on a certain question binds a single Judge when he has to answer that question and that he cannot refuse to be bound on the ground that a certain argument or a certain provision was not noticed by the Bench

M/s Devi Das v *Income-tax Commissioner*[5] In this case, the question was whether the Income-tax Authorities were bound by the declarations of law made by the High Court. The following observations of Beg, J, are instructive :—

" This brings us to the question whether the Income-tax Authorities are bound by the declarations of law made by this Court relating to the validity of a statutory provision, when such a declaration is made in the exercise of this Court's jurisdiction to make that declaration It appears to me that the whole purpose of Article 226 of the Constitution and other provisions of law which empower this Court to give declarations about the validity of the statutory provisions, after applying the constitutional tests, is that such declarations should be regarded as binding by all authorities and citizens within the State subjected to the jurisdiction of the High Court making the declaration It also appears to me to be the purpose behind the advisory jurisdiction conferred by section 66 of the Income-tax Act, 1922, upon the various High Courts, that Income-tax Authorities should be bound by the law declared by the various High Courts in their respective States on questions referred to them It is true that there is no constitutional provision similar to Article 141 of the Consti-

3. (1965) 2 S C J 638 (1965) 2 M L J (S C) 122 . (1965) 2 An.W.R. (S C.) 122 : A I.R. 1965 S C. 1349.
4. A I R 1967 All 181 (F.B)
5. A.I.R. 1967 All. 414.

tution, relating to declarations of law by the Supreme Court of India, which can be relied upon in support of the proposition that declarations of law by this Court are binding upon all the authorities and citizens within the State of Uttar Pradesh. Nevertheless, that appears to me to be the object of the constitutional provisions giving the High Court the power to pronounce on the constitutional validity of legislative measures The result flows logically from the constitutional and other provisions of law making the High Court of a State the highest law-declaring authority within the State"

The learned Judge has further stated that the doctrine deducible from the constitutional and other provisions relating to declarations of law by the High Court has to be accepted by all authorities and citizens within a State and that the binding force of the law declared by the High Court is based upon considerations other than those contained in the doctrine of *res judicata.*

Prithvi Cotton Mills v *Broach Municipality*[6] Miabhoy, C J, while commenting on the principle now under consideration said :—

"The binding nature of a decision arises from the fact that the point of law raised and considered therein has been decided by the Court concerned, and it is obvious that so long as that decision remains intact, it is binding on all Courts and tribunals which are subordinate or co-ordinate to the Court recording the decision"

Our legal system is based on the British model It is beyond dispute that under the English Common Law, the law declared by a superior Court is binding on all inferior Courts and Courts of co-ordinate jurisdiction The same principle has been followed consistently in India also The Constitution of India has given effect to this principle by embodying the provisions referred to in the preceding paragraphs Even in the Government of India Act, 1935, (26 Geo V and Edw. VIII, Ch 2), whereas section 212 provided that the law declared by the Federal Court or by the Privy Council should be recognised as binding on, and followed by, all Courts in British India, there was no similar provision relating to decisions of High Courts All the same, the principle that subordinate Courts were bound by the decisions of the High Court was being followed even prior to the commencement of the Constitution.

It will be seen from *East India Commercial Co* v *Collector of Customs*[7], that the Supreme Court has relied mainly on Article 227 for arriving at the conclusion that Courts subordinate to the High Court and tribunals in the State are bound by the decisions of the High Court A brief survey of the constitutional provisions which preceded Article 227 will be useful Section 15 of the Indian High Courts Act, 1861 (24 and 25 Vict c 104), conferred on the High Court the power of superintendence over subordinate Courts In 1915, when the 1861 Act was repealed by the Government of India Act, (5 and 6 Geo 5 c 61), section 107 of the 1915 Act provided for supervision of subordinate Courts by the High Court Both section 15 of the 1861 Act and section 107 of the 1915 Act were always understood as conferring on the High Court *not* only administrative, but also judicial, superintendence over

---

6. A.I R. 1968 Guj. 124.
7. (1963) 3 S C R, 338 A.I R. 1962 S.C. 1898.

subordinate Courts It was held that the High Court could interefere in revision under the said section 107, even in cases where section 439 of the Criminal Procedure Code or section 115 of the Civil Procedure Code, was inapplicable [*Balakrishna* v. *Emperor*[8] and *Manmatha* v *Emperor*[9]] This power of *judicial* supervision was taken away by sub-section (2) of section 224 of the Government of India Act, 1935 (26 Geo. 5 and 1 Edw VIII Ch 2) Article 227, which is a reproduction of section 224 of the 1935, Constitution, however, contains *no* provision corresponding to sub-section (2) of that section It is clear that the power of *judicial* superintendence, which the High Court had under the 1861 and 1915 Acts, but which was taken away by the 1935 Act, has now been restored to the High Court by Article 227 It is now settled that that article includes judicial superintendence as well [*Waryam* v *Amarnath*[10] and *Hari Vishnu* v *Ahmed*[11]] That this was the intention of the framers of the Constitution also is evidenced by the debates that took place in the Constituent Assembly on Article 227 and the other connected papers When the Part of the *Report on the Principles of a Model Provincial Constitution* relating to the Provincial Judiciary was taken up for consideration by the Constituent Assembly, Sardar Vallabhbhai J Patel, moved *inter alia* that the provisions of the Government of India Act, 1935, relating to the High Court should be adopted *mutatis mutandis* Thiru Alladi Krishnaswami Ayyar moved an amendment to the model Constitution to provide that, in addition to the powers enumerated in section 224 of the 1935 Act, the High Courts should have power of superintendence over subordinate Courts as under section 107 of the Government of India Act, 1915 He explained the reason for his amendment in the following words —

" The clause is intended to remedy a defect introduced by the Act of 1935 under which the High Courts were deprived of the powers of superintendence in certain respects over the subordinate Courts The amendment, I venture to state, has the universal support of the profession and I commend it for your acceptance ".

Thiru K M Munshi also supported the amendment After discussion, the amendment, on being accepted by Sardar Patel, was carried by the House (*See* pages 710-720 of Vol IV of the *Constituent Assembly Debates*) At pages 181-182 of Volume IV (Select Documents) of *The Framing of India's Constitution* by B. Shiva Rao, while dealing with Article 227, which in the draft Constitution was numbered as Article 203, it is stated as follows .—

" *Note.*—Justice Manohar Lall of Patna High Court : " would give the High Court a wide power of superintendence and not confine it to administrative matters only."

It is not intended that the power of superintendence of the High Court should be confined to administrative matters only, and these amendments have been suggested by the Drafting Committee to make this intention clearer "

8 A.I.R 1933 Bom 1 (F B.)
9 (1933) 37 Cal W N 201
10 (1954) S C J 290 1954 S C.R 565 A I.R 1954 S C 215
11. (1955) S.C J 267 (1955) 1 S.C R. 1104 (1955) 1 M L.J. (S C) 157 A.I R. 1955 S.C. 233.